

The Hindu Wills
Act.

1865



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other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

See *Hooker v. Hatton*, 1 Bro. C. C. 389 n.; *Cresswell v. Cresswell*, L. R. 6 Eq 69

Explanation.--In the last four rules, the word *Will* does not include a *Codicil*.

Illustrations.

(a) A, having ten shares, and no more, in the Bank of Bengal, made his Will, which contains near its commencement the words, "I bequeath my ten shares in the Bank of Bengal to B." After other bequests, the Will concludes with the words, "and I bequeath my ten shares in the Bank of Bengal to B." B is entitled simply to receive A's ten shares in the Bank of Bengal.

(b) A, having one diamond ring, which was given him by B, bequeathed to C the diamond ring which was given him by B. A afterwards made a Codicil to his Will, and thereby, after giving other legacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B.

(c) A, by his Will bequeaths to B the sum of 5,000 rupees, and afterwards, in the same Will, repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

(d) A, by his Will, bequeaths to B the sum of 5,000 rupees, and afterwards, in the same Will bequeaths to B the sum of 6,000 rupees. B is entitled to receive 11,000 rupees.

(e) A, by his Will bequeaths to B 5,000 rupees, and by a Codicil to the Will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

(f) A, by one Codicil to his Will, bequeaths to B 5,000 rupees, and by another Codicil, bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(g) A, by his Will bequeaths "500 rupees to B because she was his nurse" and in another part of the Will bequeaths 500 rupees to B "because she went to England with his children." B is entitled to receive 1,000 rupees.

(h) A, by his Will bequeaths to B the sum of 5,000 rupees, and also, in another part of the Will, an annuity of 400 rupees. B is entitled to both legacies.

(i) A, by his Will, bequeaths to B the sum of 5,000 rupees, and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.

NOTES AND COMMENTARIES.

- § 1. Double gifts.
- § 2. The rules.
- § 3. Class A.—"If there is nothing in the will....."
(1) *Prima facie* "Repetition."
(2) *Prima facie* "Cumulative."
- § 4. Class B.—Where there is evidence of the testator's intention.

- § 5. Where presumption rebutted.
- § 6. Where presumption not rebutted.
- § 7. Parol evidence.
- § 8. "Explanation."
- § 9. Incidents of substituted or cumulative legacies.

Extent of the section.

This section is extended to the Hindus, Jains, &c., to the Parsees and to the Talukdars

§ 1. Double gifts.—Double gifts are, where there are two gifts to the same person. There may be four cases of such gifts : (a) where the same specific thing is given twice ; (b) where the like quantity is given twice ; (c) where the second is less in amount than the first ; and (d) where the second is larger in amount than the first [Aston, J. in *Hooley v. Hatton*, 1 Bro. C. C. 390 ; 2 W & T. L. C. 321]. Besides, such gifts may be made either in the same instrument or in different instruments. The general rule applicable in such cases is, that where the bequests are of the same thing or are equal in amount, and are in the same instrument, the second is to be construed as a mere repetition of the first ; but where the bequests vary in amount or kind, or are in different instruments, the second is cumulative and not a mere repetition or substitution for the first (1) (a).

The leading case on the subject is *Hooley v. Hatton* (*supra*) where the testatrix gave by her will to the plaintiff a legacy of 500*l.* **Hooley v. Hatton.** and then by a codicil declared, "I give Lydia Hooley (the plaintiff) 1000*l.*" The question was, whether the last legacy alone passed, or the legatee was entitled to both, and it was held that the second bequest was cumulative and the plaintiff was entitled to both the sums.

§ 2. The rules.—The question whether any particular bequest is cumulative or is a mere repetition of the first, may be raised in two classes of cases. These are :—

A. Where "there is nothing in the will to show what the testator intended."

B. Where there is evidence of the testator's intention apparent on the face of the will.

The rules under this section are applicable to class A only, *i. e.*, where there is no intrinsic evidence as to the testator's intention. They are not applicable to class B, because there, the testator's intention being apparent, that intention is the only and the best rule of construction [*Ridges v. Morrison* 1 Bro. C. C. 389]. (2).

These rules generally correspond with the four cases noted above (§ 1).

§ 3. Class A. "If there is nothing in the will."

The cases under this class may be divided as follows :—

(1) Where the second gift is *prima facie* a repetition.

(a) the bequests being in the same instrument ;

(b) the bequests being in different instruments.

(2) Where the second bequest is *prima facie* cumulative.

(a) where the gifts are in the same instrument ;

(b) where they are in different instruments.

(a) If the second legacy is intended by the testator to be given in addition to the first, the second is commonly called a "cumulative legacy." But if the second is intended to be given in the place of the first, it is commonly spoken of as a "substitutional or substitutive legacy." Page p. 945 & 798.

(1) Wms. 1295, 1296 ; Hawk. 304 ; Bigelow. 324-25 ; Theob. Chap. XVI.

(2) Wms. 1295.

See the following Table.

Table showing the application of the Rules.

Whether any particular bequest is repetition or cumulative.	Where rules applicable {	Class A -- {	Where there is nothing to show what the testator intends	(1) Where the second gift is <i>prima facie</i> a repetition	(a) The bequests being in the same instrument } 1st and 2nd Rule apply
					(b) The bequests being in different instruments } 1st Rule applies.
				(2) Where the second gift is <i>prima facie</i> cumulative	(a) Where the gifts are in the same instrument } 3rd Rule applies
					(b) Where they are in different instruments } 4th Rule applies
	Where rules not applicable. {	Class B -- {	Where there is evidence of the testator's intention apparent on the face of the will.	Evidence of such intention is generally afforded by—	
				(1) The form of the second instrument	(a) Where presumption of being cumulative rebutted by such intention. See § 5 <i>infra</i>
				(2) The contents of the second instrument	
				(3) The character of the second gift	
				(4) The purpose or motive of the gifts	(b) Where not so rebutted See § 6 <i>infra</i>

(1) **Where the second is *prima facie* a repetition.**—The 1st and 2nd rule govern cases under this head.

(a) **The bequests being in the same instrument.**—

First rule.—where the same specific thing is bequeathed twice to the same legatee *in the same will*. This is almost a *verbatim* reprint of the 1st rule in Williams' "Executors." The reason of this rule is very plain,—because the same specific thing or *corpus* cannot be given twice. Thus where a testatrix by the first codicil gave C. her single diamond ring, and by the fourth codicil gave her the same thing in the same words, it was held that C. was entitled to receive the specific diamond ring only [*Duke of St. Albans v. Beaucherk*, 2 Atk. 636. See also *Suisse v. Lowther*, 2 Ha. 432] (1). See illus. (a) and (b).

Second rule.—The meaning is, that, if a legacy, in a will, be given to a certain individual and in the same will a legacy of precisely the same amount be given again to the same individual, this will raise a presumption that the second legacy is merely a repetition of the first, by inadvertence, forgetfulness, or otherwise. Thus where amongst a series of legacies and annuities the testator declared—"To Thomas Newman I give an annuity of 30*l.* for his life payable quarterly," and again, in the same instrument repeated "I give to Thomas Newman, the butler, 30*l.* a year for his life," it was held, that the second gift was merely a repetition of the first [*Holford v. Wood*, 4 Ves. 75; *Garth v. Meyrick*, 1 Bro. C. C. 30; *Manning v. Thesiger*, 3 My. and K. 29] (2). See illus. (c). This rule corresponds to Mr. Justice Williams' second rule (3).

(b) **The bequests being in different instruments.**—This is also governed by the first rule.—Double gifts of the same specific thing is a repetition of the first, whether such gifts are in the same or different instruments.

(1) Wms. 1295; Flood. 486; 2 W. and T. L. C. 321; Theob. 136, 5th Edn.

(2) Hawk. 303, 304; Theob. 134, 5th Edn.

(3) Wms. 1295.

[*Duke of St. Albans v. Beaudekerk, supra*]. If a legacy of the same amount be given to the same person in two different testamentary instruments, and the *same motive* be assigned for each, a presumption will be raised that only one legacy was intended, and the second is a mere repetition of the first [See *Hurst v. Beach*, 5 Madd. 358] (1).

(2) **Where the second bequest is *prima facie* cumulative.**—The general rule, as already seen, is that, where in different writings there is a bequest to the same legatee, of equal, greater or less sums, the latter is an augmentation, *i.e.*, cumulative [*Hooley v. Hatton, supra*]. The principle is, “he who has given more than once, must *prima facie* be intended to mean more than one gift” (*Ibid*). So where two legacies of unequal amount are given to the same legatee in the same instrument, the legatee will be entitled to both, *i. e.*, the second is cumulative.

(a) **Where the bequests are in the same instrument.**—Cases under this head are governed by the 3rd rule (see illus. *d*). This rule seems to contemplate such cases of double legacies as are *unequal in amount* only. As a matter of fact, however, legacies may be not only of different amounts but of different kinds also. If, for instance, A. by his will bequeath to B. Rs. 5000, and also in another part of the same will, give an annuity of Rs. 400, B. will be entitled to both the legacies. [This is illustration (*h*). See *Masters v. Masters*, 1 P. Wms. 423, 424]. Thus it seems, the rule is applicable to cases of double gifts of unequal *quantity* also. It applies also where one legacy is given generally and the other for a particular purpose, or where one reason is assigned for the first and a different reason for the second, as in illustration (*g*) [*Ridges v. Morrison*, 1 Bro. C. C. 388]; or where there is a variation as to the mode or time of payment of each legacy, as where the annuities although of the same amount, are payable at different times [*Currie v. Pye*, 17 Ves. 462]; or where one bequest is absolute, and the other is contingent, as in illustration (*i*) [*Hodges v. Peacock*, 3 Ves. 735; *Wray v. Field*, 2 Russ. 261, 262] (2).

This rule corresponds to the 3rd rule in Williams’ “Executors and Administrators” (3)

(b) **Where the bequests are in different instruments.**—Cases under this head are governed by the 4th rule. The gist of the rule seems to be that, where there are two bequests, given *simpliciter*, to the same legatee and by two different instruments, the second gift is to be presumed to be cumulative. In such a case, the fact that the second is equal to, greater or less than the first gift, is of no consequence (4). See illus. (*e*) and (*f*). Accordingly, although the bequests may be in different instruments, if they are not given *simpliciter*, but the motive of the gift is expressed in both instruments, and such motive be the same, and the amount also be the same, a presumption will be raised from this coincidence that the testator meant the second to be a repetition of the first, and not cumulative, as it would otherwise be [*Hurst v. Beach, supra*; *Benyon v. Benyon*, 17 Ves. 34] (5).

It being evident, therefore, that the presumption which is raised simply from the fact of there being two bequests by two different instruments, is a

(1) Hawk. 305.

(2) Wms. 1298-99; Bigelow. 325.

(3) Wms. 1295.

(4) Wms. 1276; Hawk. 303, 304; Bigelow. 325.

(5) Wms. 1298.

rebuttable presumption, the question arises by what means, or under what circumstances, that presumption may be rebutted. This leads to the second of the above mentioned classes.

§ 4. Class B.—Where there is evidence of the testator's intention—The foregoing rules do not apply where there is evidence of the testator's intention as to whether any gift is cumulative, apparent on the face of the instrument, as in the case last cited, *i.e.*, *Hurst v. Beach*, *supra*. Evidence of such intention is generally afforded by the following (1):—

- (1) The form of the second instrument.
- (2) The contents of the second instrument.
- (3) The character of the second gift.
- (4) The purpose or motive of the gifts.

If the intention of the testator can be gathered from the instrument containing the legacies, such intention will override any presumption which might be raised in the absence thereof.

§ 5. Where presumption rebutted.—The following are some of the cases in which the presumption was rebutted.

Where A. made on the same day two codicils substantially identical, by each of which he gave a legacy of 5000*l.* for life to D., and D. was in possession of both the instruments at A.'s death, it was held that the codicils were duplicates of each other [*Whyte v. Whyte*, L. R. 17 Eq. 50] (2).

So where the testator bequeathed by will to his wife 2000*l.* "for her own sole or separate use," and then gave 3000*l.* more by a codicil, and lastly by another codicil said "not having time to alter my will, I hereby charge the whole of my estate in her favour with the sum of 20,000*l.*" it was held that the latter bequest was a substitution for both the former legacies [*Russell v. Dickson*, 4 H. L. Ca. 293] (3).

In like manner the presumption was rebutted where the second instrument was described as the last will and testament [*Jackson v. Jackson*, 2 Cox 35]; where the later codicil appeared to be a mere copy of the previous one with slight variations [*Coot v. Boyd*, 2 Bro. C. C. 521; *Chichester v. Quatrefages*, (1895) p. 186]; and where the later instrument was made for the purpose of explaining the legacies given by the earlier [*See Duke of St. Albans v. Beaclerk*, 2 Atk. 1936; *Moggridge v. Thackwell*, 1 Ves. Jun 473; *Coot v. Boyd*, *supra*] (4).

Again, the context may similarly show that two legacies of the same amount and in the same instrument are cumulative and not substitutional, as where an additional reason is assigned for the second legacy (5).

§ 6. Where presumption not rebutted.—Although the same motive being assigned for each legacy in different instruments, the presumption of cumulative legacy will be rebutted, no such result will follow if there is no motive, or a different motive is assigned in either instrument, even if the sums are equal. Thus where the testatrix bequeathed by will an annuity to her

(1) Wms. 1297; Theob. 135-136, 5th Edn.; Theob. 109-10, 3rd Edn.

(2) Theob. 110, 3rd Edn.; 136, 5th Edn.

(3) Hawk. 304; Theob. 109, 3rd Edn.; 135, 5th Edn.

(4) Theob. 109, 110, 3rd Edn.; 135, 136, 5th Edn.; Hnwk. 305, Wms. 1297.

(5) Hawk. 305.

"servant" E. H., and again by a codicil bequeathed the same annuity to her "servant" E. H., it was held that the latter was cumulative, as the word "servant" was not a motive but a description only [*Roch v. Callen*, 6 Ha. 531] (1).

§ 7. **Parol evidence.**—The rule that double legacies by different instruments are *prima facie* cumulative, is a rule of construction, and not a mere presumption. Hence parol evidence is not admissible to show that one legacy only was intended (a) [*Hurst v. Beach*, 5 Madd. 351] (2). In other words, the "presumption" that is raised against such legacies being cumulative from the fact that the sums and the expressed motives of both exactly correspond, may be rebutted by parol evidence. The effect of such evidence is "not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed." Thus extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable the Court to place itself in the position of the testator. [*Hurst v. Beach*, *supra*; *Martin v. Drinkwater*, 2 Beav. 215; *Hall v. Hill*, 1 Dru. and War. 113, 114] (3). As to the admissibility generally of extrinsic evidence, see *Higgins v. Dawson* [(1902) A. C. 1].

§ 8. **"Explanation."**—The explanation to the effect that, "the word 'Will' does not include a codicil," means that, although a will and a number of codicils usually form but one instrument, they will for the purpose of making a cumulative legacy be regarded as distinct instruments (4).

§ 9. **Incidents of substituted or cumulative legacies.**—As a general rule such legacies are subject to the same incidents and conditions as the original legacy, specially with regard to the vesting of separate estate, the fund out of which it is payable, and provisions against lapse. That is to say, if an original legacy is expressed to be given out of a certain specified fund, a substituted or a cumulative legacy, *i. e.*, a gift in addition to or in lieu of a previous gift, will *prima facie* be considered as intended to come out of the same fund. Thus if A. by his will give B. an annuity of Rs. 100 a year for his *separate use*, and by a codicil give him an additional sum of Rs. 300, the second legacy will be construed to be also for the legatee's *separate use*. [See *Leacroft v. Maynard*, 1 Ves. Jun. 279] (5).

32. [89 (S).]—A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Constitution of residuary legatee.

(a) Mr. Hawkins is of opinion that originally the inference against a double legacy was a "presumption" only, adopted from the Civil Law [citing *Hooley v. Hatton* 1 Bro. C. C. 390, N.], and therefore capable of being rebutted by parol evidence. He adds, however, "But perhaps the question would not be regarded as one of construction simply upon the language of the instrument, and therefore not admitting of parol evidence" (6).

(1) Hawk. 305; Wms. 1298. F. N.: Theob. 111, 3rd Edn.; 137, 5th Edn.

(2) Hawk. 305; Wms. 1299, 1300.

(3) Wms. *ibid*; Tayl. Ev. § 1110; 2 W. & T. L. C. 336; Theob. 108, 3rd Edn.; 134, 5th Edn. (4) Flood, 487.

(5) Wms. 1301; Theob. 111, 3rd Edn.; 137, 5th Edn. (6) Hawk. 305.

Illustrations.

(a) A makes her Will, consisting of several testamentary papers, in one of which are contained the following words—"I think there will be something left, after all funeral expenses, &c., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

(b) A makes his Will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure." B is constituted the residuary legatee.

(c) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B. is the residuary legatee.

NOTES AND COMMENTARIES.

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| § 1. <i>Words constituting a residuary legatee.</i> | § 3. <i>"Surplus or residue."</i> |
| § 2. <i>Words not so constituting.</i> | § 4. <i>Residue of "residue."</i> |
| | § 5. <i>Particular residue.</i> |

Extent of the section.

This section is extended to the Hindus, Jains, &c., to the Parsees and to the Talukdars of Oudh.

§ 1. **Words constituting a residuary legatee**—No particular form or expression is necessary to constitute a residuary bequest or legatee. This follows from the fact that no particular form of words is requisite for the validity of a will. Hence it will be sufficient for the purpose, if the intention of the testator be plainly expressed in the will, that the residue or the surplus of his estate, after payment of debts and legacies, shall be taken by a person designated therein [See *Fanindra Kumar Mitter v. Administrator General of Bengal*, 6 C. W. N. 321; *Manorama Dassi v. Kally Charan Banerjee*, I. L. R. 31 C., 166; 8 C. W. N. 273]. Thus the words "what is left, my books and furniture, and all other things" [*In re Cadge*, L. R. 1 P. & D. 543]; "money left unemployed" [*Legge v. Asgil*, 1 Turn & Russ. 265, N. (a)], "whatever remains of money" [*Dowson v. Gascoin*, 2 Keen. 14]; "all that may remain of my money after my lawful debts and legacies are paid" [*Rogers v. Thomas*, 2 Keen, 8; *Re Egan* (1899) 1 Ch. 688]; "everything of everykind that I have now or may have at the time of my decease in my apartments at A or elsewhere" [*Re Scarborough*, 30 L. J. P. and M. 85]; "the rest of my money" [*Re Bramley* (1902) P. 106]; "all my other property" [*Lloyd v. Lloyd*, L. R. 7 Eq. 485]; and "all other chattels" [*In re Sharman*, L. R. 1 P. & D. 661], have been held to constitute a residuary bequest. In *In re Bassett's Estate* [L. R. 14 Eq. 54], where after some legacies were given the testator declared "after these legacies and my funeral expenses are paid, I leave to my sister A," it was held, this was a gift of the residue. So a gift of the testator's personal estate "not hereinbefore disposed of" [*Roberts v. Cooke*, 16 Ves. 451], and a gift of "all other my property" [*Bernard v. Minshull*, 1 Johns. 276], have been held to be a form of residuary bequest (1).

In *Dwarka Nath Bysack v. Burroda Purshad Bysack* [I. L. R. 4 C., 443; 1 C. L. R. 566], the words, "should there be any surplus after the above

(1) See Wms. 1460-62; 1 Jarm. 358, 775, 776, 4th Edn.; Bro. P. P. 155; Theob. 204, 5th Edn.; Hawk. 41, 52.

expenditure," have been construed as creating a general residuary bequest. So in *Ashutosh Dutt v. Doorga Charan Chatterjee* [I. L. R. 5 C., 438; L. R. 6 I. A. 182; 5 C. L. R. 296], the words, "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom," have been held to constitute a bequest of the residue to the testator's family.

Hence a gift of property in a will, by way of residue, "will include all property within the general description which is not otherwise effectively disposed of by the will, unless a clear intention is expressed that some of this shall in no event form part of the residue." [See *Re Bagot, Paton v. Ormerod*, (1893) Ch. 348; *Blight v. Hartnoll*, 23 Ch. D. 218; *Jairam Narayan v. Kessowjee Dewjee*, 4 Bom. L. R. 555, 558].

§ 2. **Words not so constituting.**—"In case there is any money remaining I should wish it to be given in private charity" [*Ommauney v. Butcher*, 1 Turner and Russ. 260]; "three or four thousand pounds or whatever remaining sum or sums" [*H'reuch v. Jutlings*, Beav. 521]; "whatever may remain to my account after payment of my debts and pecuniary legacies" [*Hastings v. Hane*, 6 sim. 67].

§ 3. **"Surplus or residue."**—These words are synonymous. In *Dwarka Nath Bysack v. Burroda Purshad Bysack* (*supra*), Mr. Justice Pontifex said:—"it seems to me that the words 'surplus' and 'residue' have identical meanings; one meaning *that which is over*, and the other *that which is left*."

The word *Residue* "means all of which no effectual disposition is made by the will, *other than* the residuary clause" [Sir J. Plumer, M. R., in *Skrymsher v. Northcote*, 1 Sw. 566] (1). The residue is the net residue after payment of debts, legacies and testamentary expenses. As to the meaning of the words, "residue," "surplus," "rest and residue," "remaining property," see *Bebb v. Penoyre*, 11 Ea. 160; *Mayor of South Molton v. Att. Gen.* 5 H. L. C. 1; *Presant v. Goodwin*, 1 Sw. and Tr. 544; *Attree v. Attree*, L. R. 11 Eq. 280; *Smyth v. Smyth*, 8 Ch. D. 561.

§ 4. **Residue of "residue."** The word "*residue*" does not in its signification, extend to a gift of the *residue* of that residue. So that, if the gift of a part of the residue fails, the part so failing shall not go to the residuary legatee (as it would in an ordinary residuary gift) but shall devolve as in an intestacy. [See *Kedar Nath Dutt v. Atul Krishna Ghose* 12 C. W. N. 1083, at 1086]. Thus where a testator gave his residuary estate equally between his two daughters, and provided that, in the event of either of them dying without children, out of the moiety of the one so dying 500*l* would pass to H. and "the remainder of that moiety" to the other daughter, and he then revoked the gift of 500*l* without making any fresh disposition of it, it was held that this gift went to the next of kin, the principle being that "when the disposition of an aliquot part of the residue itself fails from any cause, that part will not go in augmentation of the remaining parts, as a residue of residue, but will devolve as undisposed of" [*Skrymsher v. Northcote*, *supra*; *Green v. Pertwee*, 5 Ha. 249]. This view of the law was, for some time, of doubtful authority, but the point is settled now [See *In re Palmer*; *Palmer v. Ainsworth* (1893) 3 Ch. 369, overruling *Humble v. Shore* 7 Ha. 247, which served to unsettle the principle laid down in *Skrymsher v. Northcote*, *supra*;

See *Mahomedbhak v. Fatmabai*, 8 Bom. L. R. 615, in which the teaching of these cases has been very clearly explained by Sir L. Jenkins C. J.] (1). See sec. 95 (S), *infra*.

§ 5. **Particular residue.**—See *infra*, sec. 90 (S), § 5.

33. [90. (S)]. - Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Property to which
a residuary legatee
is entitled.

Illustration

A by his Will bequeaths certain legacies, one of which is void under section 105, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his Will, A purchases a Zamindari which belongs to him at the time of his death. B is entitled to the two legacies and the Zamindari as part of the residue.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 7. <i>Right of heir in the absence</i> |
| § 2. <i>"All property."</i> | <i>residuary bequest.</i> |
| § 3. <i>Interest on funds set apart for</i> | § 8. <i>Undisposed of residue.</i> |
| <i>charity.</i> | § 9. <i>Doctrine of Ejusdem generis.</i> |
| § 4. <i>General residuary bequest.</i> | § 10. <i>Etcetera.</i> |
| § 5. <i>Particular residuary bequest.</i> | § 11. <i>"At the time of his death."</i> |
| § 6. <i>Residuary bequest to several per</i> | |
| <i>sons.</i> | |

Extent of the section.

This section is extended to the Hindus, Jains, &c., to the Parsees and the Talukdars of Oudh.

§ 1. **The section.**—The meaning of the section will be best explained by the following words :—

A residuary legatee "is entitled, in that character, to whatever may fall into the residue after making the will, by lapse, invalid disposition, or other accident; or by acquirement subsequent to the date of the will." Sir William Grant says: "a residuary bequest * * * * * carries not only everything not disposed of, but everything that, in the event, turns out not to be disposed of" [*Cambridge v. Rous*, 8 Ves. 12, 25] (2). As to what falls into the residue it has been said that, "everything which is ill given by the will does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary

(1) Hawk. 42; Theob. 211, 5th Edn.; Bigelow. 323, 324, 1 Jarm. 764, 4th Edn.: 719, 5th Edn.; Underhill. 126.

(2) Wms. 1464: 1198, 10th Ed. , 1 Jarm. 761, 4th Edn.

clause and a partial intestacy, unless some part of the residue itself be ill given. It is immaterial how it happens that any part of the property is undisposed of,—whether by the death of a legatee, or by the remoteness and consequent illegality of the bequest. Either way it is residue, *i.e.*, something upon which no other clause of the will effectually operates. It may in words have been before given, but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue” [*Leake v. Robinson*, 2 Mer. 363, 393; *Fanindra Kumar Mitter v. Administrator General of Bengal*, 6 C. W. N. 321; *Camani v. Barefoot*, I. L. R. 26 M. 433].

The corresponding section of the English Wills Act (sta. 1 Vict. c. 26) is section 25, which enacts “that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.”

§ 2. “**All property.**”—It follows, therefore, that, the words “all property” include not only what has not been previously disposed of by the expressions of the will, but “that which becomes undisposed of at the death, by disappointment of the intentions of the will,” together with those real or personal properties which the testator may have acquired between the time of making his will and his decease. (See sec. 77 (S), *supra*). The expression “that which becomes undisposed of at the death, &c.” [used by Sir John Leach, V. C., in *Jones v. Mitchell*, 1 Sim. & Stu. 294] evidently refers to such bequests as are void or invalid, or becomes inoperative by lapse or any other cause [see *Camani v. Barefoot*, *supra*; *Fanindra Kumar Mitter v. Administrator general of Bengal*, *supra*]. Hence “all property” includes lapsed and void legacies, as well as after-acquired property. The term also includes property over which the testator has a general power of appointment and which he has ineffectually attempted to appoint. Where, for instance, A., in the exercise of a general power of appointment, gives Rs. 1000 to B. and gives the residue of his moveable property to C., and B. dies in A’s, lifetime, C. is entitled to the Rs. 1000 as part of the residue [*Spaoner’s Trusts*, 2 Sim. N. S. 129] (1). All property includes reversion also. So where a testator devised his house to his daughter M. and directed that she shall be entitled to the rents and profits thereof during her life, but there was no direction as regards the reversion in that house on the termination of M’s interest, it was held, that the reversion passed under the residuary devise and the residuary legatee was entitled to it [*Monorama Dassi v. Kallicharan Benerjee*, I. L. R. 31 C., 106; 8 C. W. N. 273]. See *supra*, secs. 77 (S) § 1 and 82 (S) § 2.

A testatrix, by her will dated the 23d May 1893, after devising a dwelling house to her brother’s wife absolutely, and providing for certain pecuniary legacies, directed that, “after all the trusts of this will hereinbefore particularly mentioned are carried out so far as the same are capable of being carried out, my executor shall, as soon after my death as may be, divide the residue in his hands into three equal parts” and give each of such parts to C. H., M. H., and M. C. H. By a codicil to this will executed on the 4th June 1894, the testatrix revoked the said gift of the dwelling house and bequeathed the same for some charitable purpose which, however, was not capable of taking effect. The

(1) Wms. 1464, 1465; Theob. 210, 5th Edn.; Hawk. 40, 41.

question being, whether the said house reverted to the original donee or there was an intestacy in regard to it, or it fell into the residue, it was held, that it passed under the residuary bequests of the will. In arriving at this conclusion Mr. Justice Sale, referring to the contention that the testatrix had sufficiently indicated an intention that the property was not to fall into the residue, expressed himself in these words: "But these indications of intention, * * *, cannot override the express provision of the will that the whole of the estate is to fall into the residue after providing for all the trusts of the will, so far as the same are capable of being carried out. These words surely mean that property which is the subject of trusts which are incapable of being carried out, should fall into the residue" [*Panindra Kumar Miller v. Administrator General of Bengal*, 6 C. W. N. 321] (a). . . .

The word "legatee" under English law, expresses the idea of a gift of personalty only. But the word is not used in that sense here. A "legatee" under a residuary bequest is, therefore, entitled to both moveable and immoveable property. In other words "all property" includes real as well as personal property [see *Mun Mohun Ghosal v. Puresh Nath Roy*, 22 W. R. 174].

(a) **A difficult question.**—The question, when does a lapsed legacy fall into the residue is a difficult one.—The general rule may be stated in these terms: "there must be found in the will an expression of the testator's intention not only to except such property (the subject of the lapsed legacy) either from the operation of the will or from the operation of the residuary clause in the will in favour of a particular recipient, but an intention to except it from the operation of the will, or the residuary clause, as the case may be, whether the proposed recipient in the events which happen can take the property or not. There must be found in the will the intention that whether the proposed recipient can take the property or not, it shall never fall into the general residue" [*Per A. L. Smith, L. J.*, in *In Re Bagot* (1893) 3 Ch. 348, at 361]. This rule seems to be founded upon *Easum v. Appleford* 5 My. and Cr. 61, 62] where a residuary clause is explained to embrace everything not otherwise *effectually* given, because the testator is supposed to take the particular legacy away from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the Court gives effect to the general intent. The following illustrations may be helpful:—

If a testator gives all his property to A. except a particular property which he bequeaths to B., and the latter fails (by lapse perpetuity &c), in the absence of anything to the contrary, the excepted property will fall into the residue and go to A. Here the question is, whether the property is excepted in order to take it away, under all circumstances, and for all purposes, from the person to whom the rest is given, or whether merely for the purpose of giving it to some one else; in other words, whether the exception is made for all purposes, or only for the purpose of giving it to B [see *Bernard v. Minshull*, 10hus. 206, 299; see also *Blight v. Hartnoll*, 23 C. D. 219; *Re Bagot* (1823) 3 Ch. 348; *Re Fraser*, (1904) 1 Ch. 726]; or simply whether there is any particular purpose. In the case under supposition, the testator excepts the particular property evidently for the particular purpose of giving it to B.; and accordingly, this particular purpose failing, the property falls into the residue. But if the gift is "I give my residue to A. with the exception of my house at Beadon street," and the testator never attempts in fact to dispose of it in any other way, the exception is for all purposes and not for any particular purpose so that the house will not fall into the residue, but it will pass to the next of kin as on an intestacy [see *Blight v. Hartnoll supra*].

Again, if in the case first supposed, B. was dead at the date of the will, there is an intestacy as to the house, and it does not fall into the residue. The reason is, here the failure is not by an event subsequent to the will, but the case is one of a gift which is *ab initio* ineffective, and as if it had been excepted and never given to any one [see *Re Fraser supra*].

Mr. Justice Holmes of American fame, says: "It is immaterial that the will shows that the testator expected and intended a gift to go another way, and did not expect it to pass under the residuary clause, unless the will discloses a distinct intention that it should not pass as part of the residue, even if the specified intention fails" [*Re Butchelder*, 117 Mass. 465]. See *infra* sec. 92 (S).

§ 3. Interest on funds set apart for charity.—The established rule is that, when monies have been lodged in Court to the credit of a separate account (for charitable purpose) they become separated from the general estate. Accordingly, the interest accruing on such monies does not form part of the residue, but goes to increase the capital deposited in Court and forms part of the capital for the purpose of carrying out the charity, even though such charity fails to be carried out for good many years, causing the same to be largely accumulated [*Advocate Gen. of Bengal v. Belchambers* (1908), 36 C., 261].

§ 4. General residuary bequest.—A residuary bequest may be either a bequest of the residue of any particular property, or it may be a general residuary bequest absorbing the whole of the property. A general residuary bequest may, therefore, be defined to be a bequest or devise giving all that remains of the realty or personalty respectively after satisfaction of the other devises and bequests contained in the will. It is accordingly only a general residuary bequest that passes everything not disposed of, “whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse or any other event” [*Bernard v. Minshull*, 1 Johns. 276; *In re Bagot*; *Paton v. Ormerod*, (1893) 3 Ch. 348] (1).

Where a testator, after making suitable provisions for annual Stadhys, &c., feeding of Brahmins, and gifts to Brahmin pundits holding *tolis*, directed that “should there be any surplus after the above expenditure, then I do hereby direct my trustee to spend the said surplus in the contribution towards the marriage and education of the sons of the poor amongst my class,” and such other charitable purposes; it was held that the words “should there be any surplus after the above expenditure” created a general residuary bequest which would absorb the whole of the property [*Divarka Nath Bysack v. Burroda Pershad Bysack*, 1 L. R. 4 C., 443; 1 C. L. R. 566]. But where the testator directed his books, plate, and household furniture to be sold, and after giving a legacy, declared, “in case there is any money remaining I wish it to be given in charity,” the latter words were held not to comprise the general residue, on the ground that the testator intended to confine them to the residue of the produce of the articles directed to be sold. In this case the testator’s general residue consisted of a household estate, money in the funds and a balance in cash [*Ommanner v. Butcher*, 1 Turn. & R. 260] (2). “The general rule,” says Lord Cottenham, in *Easum v. Appleford* [5 My & Cr. 56], “that a residuary clause passes a lapsed legacy, arises from the circumstance, that the residuary clause is deemed and understood to comprise everything not before given and bequeathed by the will. The Court gives effect to the general intention of a testator; but where the general presumption in favor of the residuary legatee is negatived, the rule does not apply. * * * * The residuary legatee, in order to take the whole, must be a general legatee: for if the testator confines the residue to what may remain after certain deductions, the residuary legatee becomes a specific legatee” (3).

“A general residuary bequest, contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates. Thus, if the testator bequeaths the residue of his personal estate to such son of A. as shall first attain 21, and A. has no son at the testator’s death, the income of the residue does not

(1) 1 Jarm. 761, 762, 4th Edn.; Underhill 125; Theob. 210, 5th Edn.

(2) Wms. 1462, 1 Jarm. 773, 4th Edn.; Hawk. 53.

(3) 1 Jarm. 761, 4th Edn.; Hawk. 41; Wms. 1465.

go to the next of kin, but accumulates in trust for a son of *A., who may come into existence" [*Trevanion v. Vivian*, 2 Ves. Sen. 430] (1).

§ 5. Particular residuary bequest.—As already seen, a bequest of the residue of any particular property, that is, where a testator sets apart a limited fund, and, after giving various legacies out of it, bequeaths the residue of it to a person, the bequest is a "particular residuary bequest." See *supra* sec. 89 § 4, p. 304. Here also a difficulty arises when a legacy given out of such fund fails by lapse or otherwise, and it is required to determine whether it falls into the particular residue or general residue. It may be noted, however, that, if the particular residue is held to be a gift of a specific sum, the lapsed legacy falls into the general residue [*Easum v. Appleford*, 5 My. and Cr. 56]. But if the gift of the particular residue is regarded as a gift of what shall happen to be the surplus of the fund, the lapsed legacy will fall into the particular residue. [See *Champney v. Davy*, 11 C. D. 949].

§ 6. Residuary bequest to several persons.—If the bequest is to several persons as tenants in common, a lapsed share will go as undisposed of, that is, to the next of kin, for to give the survivor a larger share would be inconsistent with the declared intention of the testator who gives to each a certain proportion of his property. Thus where a testator gave one-third of the residue to A., and another one-third to B., and as to the other third gave 500*l.* to C. and the remainder to D., and C. died in the lifetime of the testator; it was held that the 500*l.* passed to the next-of-kin as undisposed of [*Lloyd v. Lloyd*, 4 Beav. 231; see *Easum v. Appleford*, *supra*; *Skrymsher v. Northcot*, 1 Swanst. 556 (doubted in *Re Parker*, 1901, 1 Ch. 408); *Re Loveman* (1895) 2 Ch. 348].

But where the bequest is to several persons in joint tenancy, and if one or more of them die, before or after the death of the testator, their shares will survive to the others [*Webster v. Webster*, 2 P., Wms. 347].

As to the rules governing rights of residuary life tenants and remainder men, see sections 305 & 306, Majumdar's Succession Act. See also Chapter X, Probate and Administration Act (V. of 1881).

§ 7. Right of heir in the absence of residuary bequest.—In the absence of any residuary bequest, the heir of the testator is entitled to all property belonging to him at the time of his death, of which he has not made any testamentary disposition capable of taking effect, although he might have purported to disinherit him. [See *Vundravandas Purshotamdas v. Cursondas Govindji*, 1. L. R. 21 B., 646; *Morarji Cullianji v. Nenbai*, 1. L. R. 17 B., 351; *Tagore v. Tagore*, 9 B. L. R. 377; *Sonatun Bysack v. Juggut Soondree Dasse*, 8 Moo. L. A. 66, at 87; *Lallubhai Bapubhai v. Mankuvarbai*, 1. L. R. 2 B., 388; *Damoderdas Tapidas v. Dayabhai Tapidas*, 1. L. R. 21 B., 1; 1. L. R. 22 B., 835].

According to Hindu Law, an heir-at-law cannot be excluded from his right of inheritance except by a valid devise to some other person [*Tagore v. Tagore*, *supra*; *Prasunno Coomar Ghose v. Tarruck Nath Sirkar*, 10 B. L. R. 267]. Nor can a testator impose any restriction upon his rights, in respect of property not validly disposed of. Where, for instance, a testator directed that his heirs should "not be able to make any kind of gift, sale, or alienation, or create any incumbrance on" his *baitakkhana* house, and that none of his heirs should be able to claim it in his own right,—it was held that the heirs' rights were not prejudiced by this direction [*Gokool Nath Guha v. Issur Lochun Roy*, 1. L. R. 14 C., 222]. Similarly, a bequest of a portion of the estate to the heir does not exclude him from the

undisposed of residue [*Toolseydas Datta v. Premji Trichandas*, 1 L. R. 13 B. 61]. Nor are mere negative words unaccompanied by any positive disposition of property, sufficient to alter the course of law [*Era'sha' Kathasru v. Jerbai*, 1 L. R. 4 B., 537; *Tagore v. Tagore*, 9 B. L. R. 377] (1). See ante sec. 61 (S) § 9, p. 206 and sec. III. p. 72.

§ 8. **Undisposed of residue.**—The general principle is laid down by Mr. Jarman in these words:—"If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property." (2) Thus where a testator gives the whole of his property upon trust for conversion and only partially disposes of the beneficial interest, there is a resulting trust for the next-of-kin, that is, the undisposed of residue passes to the next-of-kin [*Robinson v. Taylor*, 2 Bro. C. C. 589]. The same rule applies where the declared trust do not exhaust the whole property in carrying it out (*Ibid*).

So where a testator gave certain legacies, and provided by the last clause of his will that "With the property that might remain after paying as above the expenses of my obsequies are to be defrayed"; and then directed his trustees "to dispose of the properties in accordance with what is written in the above will and should any outstandings have to be recovered for giving effect to the said dispositions, they are to do the same, and I do by this will give them power to do whatever else they may have to do to carry out the will." The trustees carried out the trusts as directed, but the whole property not being exhausted thereby a residue was left with them which remained undisposed of. The heir of the testator laid claim to this residue and it was held, that the trustees were express trustees of the undisposed of residue for the next-of-kin, and the plaintiff, the testator's heir was entitled to it [*Mojilal v. Gavrishankar* (1910) 12 Bom. L. R. 947].

But this rule does not apply in gifts for charitable purposes, so that, if the money bequeathed for such purposes is not exhausted in carrying them out, the undisposed of residue will not go to the heir, but will be dedicated to the general purposes indicated by the testator [*Bishop of Hereford v. Adams*, 7 Ves. 324; *Re Ashton's Charity*, 27 Beav. 115; *Merchant Taylor's Co. v. Att.-Gen.*, L. R. 6 Ch. 512] (3).

§ 9. **Doctrine of ejusdem generis.**—There are several words which are large enough to pass the entire residue, but the question is, whether such words when with an enumeration of particular things, are to be cut down in their signification to pass only things *ejusdem generis* with those enumerated. The sound principle for application in such cases seems to be to give the words of comprehensive import their full extent of operation, unless it appears from the context that there are very clear and unmistakable grounds for considering them as used in a special and restricted sense. [See sec. 70 (S) ante; *Wrench v. Jutting*, 3 Beav. 521; *Rawlings v. Jennings*, 13 Ves. 39] (4). The words referred to above are goods, chattels, property, estate, money, household furniture, &c. In *Anderson v. Anderson* (1895) [1 Q. B. 742, at 753], Lord Esher, M. R., gives the rule in these words:—"prima facie general words are to be taken in their larger sense, unless you can find that in the particular case the

(1) Wms. 1225, 10th Edn.

(2) Jarman, 794, 6th Edn.; Wms. 1220, 10th Edn.

(3) Jarman, 795, 6th Edn.

(4) Jarman, 791-792, 4th Edn.

The construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically announced before." Messrs. Underhill and Strahan are of opinion that, in England, the tendency of recent decisions has been to disregard the doctrine of *ejusdem generis* [citing *Hodgson v. Jex*, L. R. 2 Ch. D. 122] (1). The words "jewellery and furniture" do not include all the moveables including horses and carriages [*Manorama Dassi v. Kally Charan Banerjee*, I. L. R. 31 C. 166, 8 C. W. N. 273]. See *supra*, n. (a) p. 154.

§ 10. *Et cetera*.—With regard to the meaning of the expression *et cetera*, the authorities are conflicting. In some cases, the term following an enumeration of particulars, has been held not to pass the general residue, but construed to mean only things *ejusdem generis*; while on the other hand, the tendency of the latest decisions seems to be to give the word the widest possible meaning [see *Chapman v. Chapman*, L. R. 4 Ch. D. 800; *Newman v. Newman*, 26 Beav. 220; *Barnaby v. Tassell*, L. R. 11 Eq. 363]. So it has been held, that the term *et cetera* following comprehensive words, such as goods, chattels, will not restrict their meaning, nor will they be limited to things *ejusdem generis*, when they are followed by an enumeration of particular things [see *Kendall v. Kendall*, 4 Russ. 360; *Fisher v. Hepburn*, 14 Beav. 617; *Swinfen v. Swinfen*, 29 Beav. 207] (2).

§ 11. "At the time of his death."—See *supra*, sec. 77 (S).

34. [91(S)]—If a legacy be given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives.

NOTES AND COMMENTARIES.

1. *The section.*
2. *The principle.*
3. *"In general terms."*
4. *"Vested interest."*

- § 5. *Different vestings.*
- § 6. *Effect of vesting.*
- § 7. *Words necessary for vesting.*

Extent of the Section.

This section is extended to the wills of the Hindus, Jains, &c., to those of the Parsees and also of the Talukdars of Oudh.

§ 1. *The section*.—This section ought to be read with sections 106 (S) and 107 (S), *post*. It deals with the vesting only of legacies, and not with their possession or enjoyment which may be delayed. It declares, first, that where the gift is in general terms the period of vesting is the death of the testator irrespective of the period of possession or enjoyment [*Ramānuja Ammal v.*

(1) Underhill, 20.

(2) Wms. 1229, 8th Ed.

Sawmi Pillai (1911) 22 M. L. J. 228], and secondly, that the transmissibility of a legacy to the legatee's representatives is determinable by the period of vesting, not by that of possession or enjoyment. So the section lays down, in substance, that a vested interest, which is not subject to be divested by death before the party becomes entitled to actual possession, is transmissible like any other property.

§ 2. The principle.—In all matters of testamentary gifts, the Courts, in pursuance of the fundamental principles of construction are always averse to declaring that a gift made by a testator must fail, even be in suspense. That is to say, where the testators' language is ambiguous, obscure or doubtful, the Courts are always in favour of a construction which will make a legacy vested rather than contingent, or, if contingent, will make it vested as soon as possible (1). Hence it is laid down, that the "Law is said to favour the vesting of estates": and this is the principle involved in this section. The effect of this principle is, "that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person in esse simply (*i.e.*, without any intimation of a desire to suspend or postpone its operation), confers an immediately vested interest" [*Garthshore v. Chalie* (1804) 10 Ves. 13] (2). See *infra*, section 106 (S), § 1.

§ 3. "In general terms."—That is, without specifying the time when the legacy is to be paid or made over; or without giving any direction in the will as to the period of vesting or enjoyment. Where, for instance, A. bequeaths Rs. 500, to B., the legacy is given "in general terms"; but where A. bequeaths Rs. 500, to B., when B. shall attain the age of 21 years, or when he shall marry, the legacy is not in general terms, for here the testator specifies the time when the legacy is to be paid (3).

§ 4. "Vested interest."—See sec. 106 (S), § 3, *post*.

The vesting will not be postponed even if the direction in the will is to pay the legacy within 12 months from the date of the testator's death. For, under section 117 (P) *post*, this delay, which is merely an allowance of time for the convenience of the executor, does not prevent the vesting of the interest immediately on the testator's death [*Garthshore v. Chalie, supra*]. Thus there may be "vested interest" though the enjoyment is delayed [*Ramm Persad v. Radha Beeby*, 7 W. R. P. C. R. 35; 4 Moo. I. A. 137]. Therefore, in the absence of any thing specified in the will as to the time when the legacy is to be paid, it shall be due, on the day of the testator's death, though it may not be payable till a later time.

"To be paid"—These words do not imply that the bequests are to consist of pecuniary legacies only. The section is applicable to devises of immovable property as well as to bequests of every species of moveable property. See sec. 90 (S), *supra*, p. 306 with illustration thereto, and sec. 106 (S), § 14, *post*.

§ 5. Different vestings.—Vesting is of different descriptions, and it seems, there may be more vestings than one at the same moment of time. Thus

(1) Page 166.

(2) 1 Jarman 255, 2d Edn.; Theob. 204, 5th Edn.

(3) Wills, 1802-20, 5th Edn.; 970, 10th Ed. 1 Jarman, 799, 4th Edn.; 736, 5th Edn.

In case of testacy, the property of the deceased vests simultaneously in his executor and in the devisee or legatee, and also in the heir; and in case of intestacy it vests first in the heir or next of kin and in the President of the Probate Division in England, or the Judge of the Court of Probate in India, and then in the administrator. These different vestings serve different purposes.

§ 6. Effect of vesting.—A devise or bequest, in the absence of anything to the contrary (as where the gift is contingent), becomes vested in interest in the devisee or legatee from the date of the testator's death, although he may not be entitled to possession except in due course of administration. The heir also, as seen above (§ 5), has a vested interest from the moment of his predecessor's death, and in some cases perhaps, (as where property has to be partitioned) his possession is deferred also. But although the possession of the heir or legatee may be postponed, the interest he derives by such vesting is of so substantial a nature that it is attachable and consequently saleable in execution of a decree against him [*Adusupatti Venkata Rao, executor to the estate of the deceased Ramanuja Ammal v. Swami Pillai*; or nom. *Ramanuja Ammal v. Swami Pillai* (1911) 22 Mad. L. J. 228]. See *post*, sec. 4 (P).

§ 7. Words necessary for vesting.—See sec. 106 (S), § 7, *post*.

35. [92(S)].—If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appear by the will that the testator intended that it should go to some other person.

In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

1. A bequeaths 500 rupees to B "500 rupees which B owes him." B dies before the testator: the legacy lapses.

(2) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the Will is made. The legacy to A and his children lapses.

(3) A legacy is given to A, and in cases of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(4) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(5) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B takes effect.

(6) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse.

- NOTES AND COMMENTARIES.

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| § 1. <i>Preliminary.</i> | § 3. <i>To Charity.</i> |
| § 2. <i>Unless it appears by the will.</i> | § 7. <i>Lapse where the gift is to a class.</i> |
| § 3. <i>"Legatee" and "some other person."</i> | § 8. <i>Lapse where the gift is to a debtor.</i> |
| § 4. <i>"Must be proved that, &c."</i> | § 9. <i>Lapse where the gift is to a creditor.</i> |
| § 5. <i>Cases in illustration of the doctrine.</i> | § 10. <i>Effect of disclaimer of legacy or refusal to accept.</i> |
| § 6. <i>Application of the doctrine.</i> | § 11. <i>"Shall form part of the residue."</i> |
| 1. <i>To power of appointment.</i> | § 12. <i>Lapse and void, distinguished.</i> |
| 2. <i>To contingent interest.</i> | |

Extent of the section

This section has been extended to the Hindus, Jains, &c., to the Parsees and to the Talukdars of Oudh.

§ 1. Preliminary.—The maxim being "*Omne testamentum morte consummatum est*" (every will is completed by death), a will does not take effect until after the death of the testator; it cannot, therefore, confer any right or benefit before that event. The result is, that a legatee who dies in the lifetime of the testator takes nothing under his will, and the gift made to him consequently fails to take effect. This failure to take effect is called "lapse," (a) a term, importing death or extinction of some object of gift before the testator's death.

But it is not death or extinction only that causes lapse, or failure of gift. The same result may be produced by other means as well. Thus if a testator give a legacy to an unmarried woman "*as long as she shall remain unmarried,*" the marriage of the woman during the lifetime of the testator will cause an equal failure of the gift [*Andrew v. Andrew*, 1 Coll. 690]. So in the case of a gift to a particular institution as existing, the non-existence of such institution at the testator's death will similarly cause a lapse (1). And similarly, there will be lapse on the failure of a contingent gift by reason of the event not happening [*Re Parker* (1901) 1 Ch. 468].

In like manner, if in illustration (c), A. survives the testator but dies before completing his eighteenth year, the legacy bequeathed to him will lapse and B. will take it. Thus, it is not merely death, but death before the gift has vested in the legatee or devisee, that causes a lapse (2). See *infra* § 6.

(a) Mr. Rood defines "Lapse," on the authority of Bigelow's *Jarman*, to designate the failure of a devise or legacy by reason of the death of the devisee or legatee before the testator, or afterwards before the interest vests. So Mr. Justice Williams (3).

The word "Lapse" is sometimes used in the sense of being revoked, as for instance, where the testator directed that if a certain event happened in his lifetime the share given to a legatee should lapse and form part of the residue [*Re Wave*, (1907) 1 Ch. 391].

According to Mr. Page, a legacy may lapse where the beneficiary refuses to take it [*Hall v. Smith*, 61 N. H. 144; *Sawyer v. Freeman*, 161 Murs. 543]. This however very rarely happens except in cases where the beneficiary would be deprived by the operation of the will of certain legal rights and elects to stand upon such rights and not to take under the will (4).

(1) 1 *Jarm.* 338, 340, 4th Edn.; 307, 5th Edn.; Bigelow 357-58; Theob. 685, 5th Edn.

(2) *Edw. Law of Property*. 403.

(3) *Rood*, § 667;

(4) *Page* § 738 p. 877.

§ 2. "Unless it appear by the will, &c."—A testator may prevent a legacy from lapsing. In order to do this he must give the property to some other person he desires, by substitution; it will not be enough if he only expresses his desire that the legacy shall not lapse [*Sibley v. Cook*, 3 Atk. 572; *Browne v. Hope*, L. R. 14 Eq. 343]. "A gift is not to be made out of negative words alone." [See *Pickering v. Stamford*, 3 Ves. 493; *Underwood v. Wing*, 4 D. M. & G. 633; *Johnson v. Johnson*, 4 Beav. 318] (1).

The real question in every case will depend upon the expressed intention of the testator. If, for instance, a man devises his estates to J. and his heirs, and signifies his intention that if J. die before him it should not be a lapsed legacy, yet, unless he had nominated another legatee, the heir-at-law of the testator is not excluded, notwithstanding the testator's declaration [See *Sibley v. Cook*, 3 Atk. 572; *Browne v. Hope*, L. R. 14 Eq. 343] (2). According to Sir James Wigram, V. C., a testator may prevent a legacy from lapsing, by doing either of two things: "he must in clear words exclude lapse, or he must clearly indicate who is to take in case the legatee should die in his lifetime" [*Browne v. Hope*, *supra*, at 347]. Thus where a testator, after giving a life interest in certain property to his wife directed that after her death the property should be divided into equal shares between his "three children, J., C. & F., or the survivors or survivor of them," and J. (who was appointed a trustee) was an attesting witness to the will; it was held, that the bequest to J. being void under section 54, Indian Succession Act, the effect of the words "or the survivors or survivor of them" would be to prevent lapse in case of J.'s death before the testator [*Camani v. Barefoot* L. L. R. 26, M., 433]. So a gift to A. with a provision that if he should die in the testator's life-time leaving issue alive at his (testator's) death, the gift will not lapse but shall take effect as if the legatee's (A.'s) death had happened immediately after the testator's death, is a valid gift and shall prevent lapse [*Re Greenwood: Greenwood v. Sutcliffe* (1912) 1 Ch. 392]. See illus. (c) & (d).

§ 3. "Legatee" and "some other person."—The words "some other person" show that the word "legatee" is intended to include natural as well as artificial persons (see definition of "person" *supra*). And, if it be taken into consideration that the doctrine of lapse is applicable to gifts for charitable purposes also. [*Re Slevin* (1891) 2 Ch. 236] (3), the meaning of the word "legatee" may be further extended to embrace all objects of testators' bounty. Thus it is submitted that the word "legatee" in this section is not intended to be confined in its application to its ordinary narrow signification, but it is intended to apply to all objects of a testamentary gift, so that, it is correct to say that lapse is the failure of a testamentary gift by the death or extinction of its object in the life-time of the testator (4). In this view, the word death must be taken to include its figurative meaning—extinction.

§ 4. "Must be proved that, &c."—It is, therefore, clear that in order that a legatee may receive the legacy he must survive the testator, and in

(1) Theob. 687, 5th Edn.; Hend. 198; Bigelow. 36, 13, 11.

(2) Wms. 1214 1215; Theob. *Ibid*.

(3) Jarm. 239. 6th Edn.

(4) *Ibid* 423 f. n. (a). Mr. Strahan, in speaking of lapse says, "Since it is impossible to make a gift to a dead person or non-existent object * * *" (Strah. Will 109). So Mr. Biglow—"The legal doctrine of lapse * * * thus imports the death or extinction, before the testator's death, of some object of his will." Bigelow, 357.

case he does not survive, the legacy lapses and no interest vests in him. So that he leaves nothing as a legatee or devisee which can be transmitted to his representative; for, the principle is, "those who take by representation only cannot be entitled to anything to which the person they represent never had any title" [*Elliott v. Davenport*, 1 P. Wms. 83; *Corbryn v. French*, 4 Ves. 435] (1). Hence the rule is that, in order to entitle the representatives of the legatee to receive the legacy it must be proved that he survived the testator. (2).

In cases like illustration (f), that is, where the testator and legatee perish in the same calamity, "the question of survivorship is, by the law of England, a matter of evidence merely and, in the absence of evidence, there is no rule or conclusion of law on the subject." The representative who claims must therefore produce positive evidence that the legatee survived the testator [*Underwood v. Wing*, 4 De Gex, M. & G. 633] (2). Where direct evidence is not procurable, recourse may be had to presumptions "based on the probabilities of survivorship resulting from strength, age and sex" (3). See sec. 112 (S) § 5. *post*.

Commorientes.

Where testator and legatee die at or nearly at the same time, they are called *Commorientes*. (4)(b).

§ 5. Cases in illustration of the doctrine.—Where the legatee had died before the date of the will, extrinsic evidence will not be admissible to show that the testator knew of his death at the time of making his will, so as to raise the presumption that he intended there should be no lapse [see *Maybank v. Brooks*, 1 Bro. C. C. 84] (5). The lapse cannot be prevented in such a case even by confirming the will by a codicil [*Hutcheson v. Hammond*, 3 Bro. C. C. 127; *Maybank v. Brooks*, *supra*].

Where A bequeathed his whole property to his brother R, and expressly directed that neither his daughter, nor his widow should take any share of his

(a) But it will appear that mere survival is not sufficient. As already seen it is the very vesting of the legacy in the legatee which regulates its transmissibility. So that, if the vesting is delayed and the legatee dies before such vesting, the legacy will not pass to his representatives although he survived the testator. It is in this sense that a legacy may lapse even if the legatee dies after the death of the testator [see *supra* sec. 91 (S) and *infra* sec. 106 (S)]. The legacy passes to the legatee's representatives only where it is given in general terms without specifying the time when it is to be paid, for in such cases, the legatee has a vested interest in the subject matter of the gift from the day of the testator's death, the fact of his death occurring without having received the legacy, not interfering with such passing.

(b) The reason is, where two people perish by the same calamity, the Court refuses to presume that they died at the same moment [*Underwood v. Wing* (1855) 4 DeG. M. and G. 633]. The latest rulings are to the effect that in the absence of any evidence as to which of the two survived the other, the applicant should be allowed to swear that there is no reason to believe that either survived the other [*Re Ewart* (1859) 1 Sw. and Tr. 258; *Re Bey nan* (1901) P. 141; *Re Good* (1908) 24 T. L. R. 493; *In the Estates of Bruce (M.) and Bruce (G. M.)* (1910), 26 T. L. R. 381].

See *infra*, sec. 112 (S). See also sec. 205 (S) § "Commorientes" Majumdar's Succession Act.

(1) Wms. 1212; Hawk. 246; Theob. 685, 686, 5th Edn.

(2) Wms. 1210.

(3) Tayl. Ev. § 159.

(4) Flood. 481; Wharton. L. Lex.; see Tr. and Coote, Pt. I Chap. XII, sec IV, where the rules in relation to *commorientes* are given in detail.

(5) Wms. 1212; Theob. 685, 5th Edn.

property, and A. predeceased him, it was held that A. died intestate, not having made any devise or bequest of the property which could take effect [*Era'sha Kulkarni v. Bendi*, 1 L. R. 4 B. 121].

Where A. by her will bequeathed to B., "his executors, administrators and assigns," the sum of 4000, which he owed her, provided he should pay thereout several sums to his children; and she directed her executors to deliver up the security and not to claim any part of the debt, but to give such release as B., his executors, &c., should require; and B. died in the life-time of A.; it was held that the legacy lapsed [*Elliot v. Davenport*, 1 P. Wms. 83] (1). See illus. (2).

Where property is dedicated to an *Idol* by a will, and a *shebait* is appointed, the devise will lapse, if the *shebait* so appointed should die without taking charge of the property or filling the office [*Sarada Sundari Debi v. Govind Mani*, 2 B. L. R. 137; F. note].

§ 6. Application of the doctrine.—The doctrine of lapse applies where the whole object of the testator in giving the legacy has failed by reason of the legatee's death. It does not apply where the testator in giving the legacy intends it not merely as a bounty to the legatee, but as the discharge of an obligation recognized by him, though not legally enforceable. Thus where the testator bequeaths a legacy for the payment of a barred debt [*Williamson v. Naylor*, 3 Y. & C. 208], or makes a bequest for the purpose of discharging a moral obligation, the bequest will take effect though the legatee may die before the testator [*Stanton v. King*, (1904) 2 Ch. 30] (2). This depends on the mixed principle of bounty and obligation, the reason being that if the obligation exists at the testator's death, there is no necessary failure of his object merely because the legatee dies in his lifetime (*Per* Farwell, J., in *Ibid*).

1. To power of appointment.—The doctrine of lapse applies to a power of appointment (3) exercised by will; that is, where the legacy is given not directly under a will, but under a power created for the purpose by the will. Accordingly, the appointee must survive the donee of the power in order to take [*Duke of Marlborough v. Godolphin*, 2 Ves. Sen., 61, 73]. Similarly a power given by will shall also lapse by the death of the donee during the life-time of the donor [*Jones v. Southall* (1862) 32 Beav. 31; *Sharpe v. McCall* (1903) 1 Ir. R. 179]. Thus a bequest to such persons as A. shall appoint, and in default, to his next-of-kin, will go to the next-of-kin in the event of A. predeceasing the testator [*Edwards v. Salway* (1848) 2 Phil. 625]. But if an appointment is made to A. upon trust for B., or upon condition of his giving part of the benefit of the appointment to B., and A. dies in the lifetime of the testator, B's interest will not be affected thereby, that is, it will not lapse [*Oké v. Heath* (1748) 1 Ves. Sen. 135]. The case of *Edwards v. Salway*, (*supra*) is an authority for the proposition that a limitation in default of appointment may be good although the power itself fails [see *Williamson v. Farwell* (1887) 35 Ch. D. 128].

It may be noted that there is a difference between general and special powers in respect of lapse (4).

(1) Theob. 685, 686, 5th Edn.; 1 Jarm. 338 F. N., 4th Edn., Wms. 1211, 1212; Hawk. 246.

(2) Jarman 423-424, 6th Edn.

(3) See sec. III. *ante*.

(4) See Jarman 844, 6th Edn.

2. **To contingent interest**—The doctrine also applies to contingent bequests. That is, a lapse may result in case of death, though the gift be upon a condition or contingency that does not happen. (See *illus. (e)*). Thus, where the bequest was to A. on his accomplishing his apprenticeship, and if he should die before he accomplished his apprenticeship then over, and A. died having accomplished his apprenticeship in the testator's lifetime, it was held, the bequest to A. lapsed [*Humberstone v. Stanton* 1 Ves. & B. 385; see *Williams v. Jones*, 1 Russ. 517] (1). In such cases, therefore, the legacy will lapse by the death of A. in the testator's lifetime, whether the contingency does or does not happen; and the gift over will take effect where the contingency does happen, whether the death of A. takes place before or after the testator's death. (a).

3. **To Charity**.—Where, for instance, the legacy is for the benefit of a particular charitable institution, and no general charitable intention can be inferred, if the institution come to an end before the testator's death, the legacy will lapse [*In re Rymer* (1895), 1 Ch. 19].

But there is a distinction between cases where there is a general intention to give to charity, and cases in which such particular mode of charity is intended as to make the testator's intention incapable of execution otherwise than in the mode pointed out by him. Where, therefore, the mode is of the substance, and if it cannot be pursued the gift will fail [see *Att.-Gen. v. Bishop of Oxford* (1786) 1 Bro. C. C.; *Corbyn v. French* (1799) 4 Ves. 431; *Clark v. Taylor* (1853) 1 Drew 642; *Russell v. Kellett* (1855) 3 Sm. and Gif. 264; *Marsh v. Means* (1857) 5 W. R. (Eng.) 815; *Fisk v. Att.-Gen.* (1867), L. R. 4 Eq. 521; *Re Ovey*; *Broadbent v. Barrow* (1885), 29 Ch. D. 560; *Re Rymer*; *Rymer v. Stanfield* (1895), 1 Ch. 19; *Stratton v. Physio-Medical College*, 149 Mass. 508; *Teele v. Bishop of Derry*, 168 Mass. 341].

But the legacy will not lapse where the gift is to a particular charity which is in existence at the testator's death, but subsequently ceases to exist before it is paid [*In re Slevin*; *Slevin v. Hepburn* (1891) 2 Ch. 236]. So there will be no lapse where the object has only partially failed. Thus where the gift was to St. Andrew's School, Heybridge; but between the date of the will and the death of the testatrix the week-day school was discontinued, the Sunday-School alone being maintained; it was held, the legacy did not lapse as there had not been a total loss of the institution [*Re Waring*; *Hayward v. Att.-Gen.* (1907), 1 Ch. 166]. In *Re Buck* [(1896) 2 Ch. 727] the legacy was to a friendly society which was established to provide annuities for its members and their widows and children if in distressed circumstances. The funds of the society were such that the legacy was not required. It was held, it had not lapsed.

As regards cases where the object never existed, or where there are several charities equally answering the description, or where the charitable purposes do not exhaust the fund—see *Jarm.* 241-242, 6th Edn.

(a) Formerly it was doubtful whether a bequest over in case of the death of the legatee before the happening of a certain event, could take effect where he died during the testator's lifetime, though before the happening of that event. [See *Willing v. Baine*, 3 P. W. 115]. But now it is settled that in such a case the bequest over takes effect [see *Willing v. Baine*, *supra*; *Humberstone v. Stanton*, 1 Ves. and B. 385; *McGreery v. McGrath*, 152 Mass. 24; *Robinson v. Portland Orphan Asylum*, 123 U. S. 702] (2).

(1) *Hawk.* 243, 245; *Theob.* 574, 5th Edn.; *Underhill.* 226; *Wms.* 1226-27 1 *Jarm.* 316, 3rd Edn.; 340, 4th Edn.; *Bigelow.* 362.

(2) *Theob.* 573, 574, 5th Edn.; *Bigelow.* 362; *Underhill.* 226, *Hawk.* 243, 244.

It must be noted that in applying the *cypres doctrine* [see *infra*, sec. 101(S)], the mode which the Court is to select need not bear absolute resemblance to what the testator intends. It has only to be ascertained that none can be found nearer to it (1).

§ 7. Lapse where the gift is to a class.—As a rule there is no lapse in such cases, if any member of the class survive the testator. The reason is, that, as a class is ascertained at a particular date, generally at the death of the testator, those of the members of the class who do not survive the testator, are considered never to have been members of it, so that no question of lapse arises. Thus, if property be given simply to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of the gift will vest in any one or more of these classes surviving the testator, regardless of those who died in his lifetime (2). See *infra*, sec. 98 (S).

§ 8. Lapse where the gift is to a debtor.—Such a bequest, whether it is a bequest of the debtor's debt or of a sum equal to it, lapses, like an ordinary legacy, by the death of the debtor in the life-time of the testator, the result being that the debt remains still owing to the representatives of the testator [*Toplis v. Baker* (1787) 2 Cox. 118; *Elliott v. Davenport* (1705), 1 P. W. 83] (3).

§ 9. Lapse where the gift is to a creditor.—A bequest to a creditor of the amount of the testator's debt also lapses, if the creditor predeceases the testator, leaving the debt still owing from the testator's representatives to the representatives of the creditor. But if the bequest is for the payment of a time-barred debt, it will not lapse but will take effect notwithstanding the creditor's death during the testator's life-time. This is so on the principle laid down in *Stevens v. King* [(1904) 2 Ch. 30], as to which see *supra* § 6. See also *Re Sowerby's Trust* (1856), 2 K. & J. 630; *Turner v. Martin* (1857), 7 D. M. & G. 429.

§ 10. Effect of disclaimer of legacy, or refusal to accept.—If a legatee disclaims his legacy or refuses to receive it, its effect is either to make the legacy void, or to accelerate the interest of the next taker, if any (4). In a case, where a testatrix, after appointing executors and trustees, bequeathed her estates to trustees upon certain trusts, and directed them to set apart 1000*l.* and invest the same and hold it upon trust to pay the income to the plaintiff for life and after her death to her son for life, declaring that after the death of such son the capital and income should fall into the residue; the plaintiff, being annoyed with the terms of the will, refused to receive the income upon which the trustees, with the plaintiff's consent, paid it to her son. On the death of her son eight years later, plaintiff retracted her refusal and claimed the income. The question was, what was the effect of such refusal and whether the refusal could be retracted. It was held, the plaintiff's refusal could not be treated on the footing of disclaimer of a legacy, and that as neither the trustees nor the residuary legatees had changed their position on the faith of that refusal, it could be retracted *quoad* future income. Referring to a passage in *Touchstone*, which had been cited by the residuary legatee in support of his contention that the *refusal* could not be retracted, Mr. Justice Swinfen Eady, expressed an opinion to the effect that notwithstanding that passage an actual disclaimer, until acted on, may be

(1) Jarm. 238, 6th Edn.

(2) Jarm. 431 *et seq.* 6th Ed.

(3) See Jarm. 424, u. (k).

(4) See *Shep*, T. 452; Jarm. 718, 720, *et seq.* 6th Edn.

retracted [*In re Young: Fraser v. Young* (1913) 1 Ch. 272; see *Eavestaff v. Austin* (1854) 19 Beav. 591].

§ 11. "Shall form part of the residuum."—See *supra*, Sec. 90 (S).

§ 12. Lapse and Void, distinction between.—See sec. 99 (S), § 4. *post*.

36. [93 (S)].—If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.(a)

A legacy does not lapse if one or two joint legatees die before the testator.

Illustration.

The legacy is simply to A. and B. A dies before the testator. B takes the legacy.

(a) This section does not say that a legacy given to two persons *simpliciter* is a legacy to them jointly. All that it enacts is that, if a legacy be given to two persons jointly and one of them die before the testator, the other legatee takes the whole. From this it cannot be concluded that the English rule as to presumption of a joint tenancy has been incorporated into this section by means of the illustration. Indeed, the illustration shows that the Legislature had in contemplation that a legacy to A and B would be a legacy given to two persons jointly within the meaning of this section. But that is not sufficient to lead to the conclusion that they intended to enact as law that such a legacy should be construed as creating a joint tenancy as known to English law. In *A. F. Gabriel v. D. Inas* [(1911) 34 M., 80] the learned Judges of the Madras High Court seem to be of opinion that the English rule of presumption in favour of joint tenancy has been adopted by the Indian legislature in this section. This opinion is based chiefly on the wording of the illustration. But granting the illustration supports this view, it must be observed that, under the well recognised principle of construction of Statutes, illustrations cannot override the law [see *supra*, *Gabriel v. Inas*, and 21 M. L. J. 261 "Notes of Indian Cases"].

In connection with the inapplicability of the principles of English joint tenancy to the affairs of this country it is worthy of note, that the English joint tenancy had its origin in the rigors of the feudal system. It was created in the reign of Edward I. with the object of escaping the burdensome incidents of feudal tenure. This was done by one putting his lands into the possession of several others jointly or of others jointly with themselves with the intent that the feoffees should dispose of the lands according to his will and hold the same for his use. The result was that so long as there were a plural number of feoffees the rule of survivorship prevailing among such tenants, prevented the accrual of the lord's right to relief, wardship, marriage, and other feudal imposts of similar description. Dower and courtesy were also avoided by this means. Again, in conveyances *inter vivos* a joint tenancy is created either by a limitation to the alienees, or to them and their heirs, expressly as "joint tenants" or "in joint tenancy." But a limitation to two or more persons "for their joint lives" does not create a joint tenancy, but is confined to the life of him who dies first [*Quarm v. Quarm* (1892) 1 Q. B. 184] (1).

That a grant *simpliciter* to two or more persons creates a joint tenancy, is a rule of the English common law. This rule is not an inflexible one, but by the rules of equity is subject to certain exceptions (2). "Relief" was a sum of money paid to the lord on succession; "wardship" and "marriage" were the right of the lord to the custody of an infant and that of disposing of such infant in matrimony (3); and 'dower' was the life estate of a widow and 'courtesy' the life tenancy of a husband (4). Thus English joint tenancy is full of technicalities.

(1) Edw. L. of Pro. 380, 3rd Edn.

(2) Jarm. 1783, 6th Edn.

(3) Wms. R. P. 47-51, 20th Ed.

(4) *Ibid* 300, 314, 20th Edn.

NOTES AND COMMENTARIES. •

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|---|---|
| § 1. <i>The principle</i> | § 5. "Two persons." |
| § 2. <i>Application of the principle to Hindus.</i> | § 6. "One of them die." |
| § 3. <i>Joint gift and joint tenancy.</i> | § 7. <i>Joint maintenance.</i> |
| § 4. <i>Where the gift is to a class.</i> | § 8. <i>Joint authority to adopt by will.</i> |

Extent of the section.

This section has been incorporated in the Hindu Wills Act and the Oudh Estates Act It is applicable to the Parsees

§ 1. **The principle.**—This section is based on the principle of joint tenancy (a). Joint tenants under the English law, take '*per my et per tout*,' i.e., by the moiety or half, and by all. So that each of such tenants is "a taker of the whole, but not wholly or solely," as in a joint Hindu family governed by the Mitakshara; and "being regarded, with respect to other persons, as but one individual, their estates necessarily continue so long as the longer liver of them exists." Thus the doctrine of *Survivorship* (b) is the governing principle which determines the rights of joint tenants (1).

Accordingly, where property is given by will to two or more persons as joint tenants, there can be no lapse unless all the objects die in the lifetime of the testator; because by the rules of survivorship, the share of a legatee or devisee who dies in the testator's lifetime, will pass to the other or others who may survive (2).

Where a testator by his will, gave to his daughter E. everything he possessed on condition that she should pay to the four daughters of his brother, J. C., 400*l.*, out of 700*l.*, and three of the four daughters died in the lifetime of the testator, the question being whether the surviving daughter was entitled to the whole legacy given to the four daughters, that is to say, whether the legacy was to be considered as a joint legacy given to the four daughters as joint tenants, or whether they were to take 100*l.* each, as tenants in common, it was ruled that an interest given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, or an inference of that sort arises in equity from the nature of the transaction, as in partnership, joint mortgages, &c.; and the plaintiff, the surviving daughter, was accordingly held to be entitled to the whole interest given to the four daughters [*Morley v. Bird*, 3 Ves. 629; see

(a) **Joint tenancy** under the English law may be defined "as ownership in community, in equal undivided shares, by virtue of a grant in terms which import an intention that the grantees shall hold, as co-tenants one and the same estate. Its essential characteristics are usually distinguished as unity of interest in the co-tenants; unity of the title under which their interests are held and (at common law) of the time of the vesting of such interests: unity of possession; and survivorship" (3).

(b) **Survivorship**, "is the feature which chiefly distinguishes joint tenancy from coparcenary and from tenancy in common. On the death of one of the joint tenants, the estate—whether it be an estate of inheritance, or for life,—remains to the survivors as joint tenants, or if there be but one survivor, then to him as owner in severalty" (4)

(1) Wms. R. P. 134; *Ibid.* P. P. 240.

(2) 1 Jarm. 340, 4th Edn.; Wms 1221-22.

(3) Edw. L. of Pro. 155; 1 Steph. 336; Wms. R. P. 134-35.

(4) Edw. L. of Pro. 157; see 1 Steph. 339-40; 2 Black. 157-58.

Jairam Narronji v. Kuverbai, I. L. R. 23 B., 491 at 509; *Navroji Manockji Wadia v. Perozbai*, I. L. R. 23 B., 82.

§ 2. **Application of the principle to Hindus (a).**—It is now settled that the principle of joint tenancy as obtaining in England is not applicable to Hindus [*Jogeswar Narain Deo v. Ram Chand Dutt*, L. R. 23 I. A. 37; I. L. R. 23 C., 670; *Yethirajulu Naidu v. Mukunthu Naidu*, I. L. R. 28 M., 363; *Bai Dewali v. Patel Beechardas*, I. L. R. 26 B. 445]. But in accepting this view we must be guarded against supposing that in gifts to members constituting a joint family there is any presumption that the donor intended to annex the condition of survivorship [see *supra* *Bai Diwali v. Patel Beechardas* and *Yethirajube Naidu v. Mukunthu Naidu*]. On the contrary, as pointed out in *Jogeswar Narain v. Ram Chand Dutt* (*supra*), the rule seems to be that, when property is given to more than one, in the absence of anything in the grant to the contrary, the presumption is that the donees take as tenants in common [followed in *Gopi v. Jaldhara* (1910) 7 A. L. J. 941; 33 A. 41; see *Kisori Dubain v. Mundra Dubain* (1911) 8 A. L. J. 757; 33 A. 665]. Mr. Phillips and Trevelyan, J., are of opinion that, where a gift is made to members of a Hindu joint family, it would be natural that it should be intended to be jointly enjoyed in the manner usual amongst Hindus; and that such joint tenure would, under the Mitakshara, involve the right of survivorship which in that school ordinarily attaches to joint family property, but would not, of course, involve any incident of joint tenancy peculiar to English law (1).

But although the principle of joint tenancy of the English law is quite foreign to Hindu law, as implied in *Jogeswar Narain Deo v. Ram Chand Dutt* (*supra*), joint ownership of another description is not only not foreign to Hindu law but quite familiar to it, *viz.*, that special kind of which the joint holding by the members of an undivided Hindu family is the type. The question, therefore, for determination seems to be one of intention to be gathered from the terms of the instrument creating the tenancy, regard being always had to the fact that in all cases the *prima facie* view is, that the devisees or donees take in severalty even when they are members of an undivided family [See *Kesori Dubani v. Mundra Dubani*, *supra*]. Of course, if the grant is to persons who are incapable of forming a Hindu joint family, they can take only as tenants in common. This being so, where a testator disposed of his house No. 1 in these terms—"..... therefore my three sons shall use and enjoy this house from son to grandson and so on in succession, without power to give as gift or sell the same;" and there were clear indications that the sons were members of an undivided family, and the testator did not intend to create a tenancy in common, it was held, that the

(a) **Joint tenancy under English law and Hindu law.**—"The joint ownership of the members of a Mitakshara family is sometimes spoken of as a joint tenancy, and sometimes as a coparcenary. But neither the ownership of joint tenants, nor that of coparceners, according to English Law, exactly resembles the proprietary interest possessed by the members of a Hindu joint family in their undivided property. In an English joint tenancy, succession takes place by survivorship, and the joint character of the tenure may at any time be dissolved by partition. In these respects the ownership of a Mitakshara family resembles that of English joint tenants. But the points of dissimilarity are numerous. A joint tenancy of English law can be created only by a will or deed, whereas the ownership of the members of a Mitakshara family arises either by birth or by adoption" (2). See *Karsondas Dharamsey v. Gangabai* [32 B., 479, 489-494] where the question is discussed.

(1) Phillips and Trev. 214.

(2) J. Bhattacharjee's Com. on H. L. p. 221, 2d Edn.

condition against alienation being void, the sons took an absolute interest in the house with rights of survivorship and was a Hindu co-parcenary [*Yethirajulu Naidu v. Mukunthu, Naidu*, I. L. R. 11 M., 258; 15 Mad., L. J. 299, per Sir S. Subrahmanya Ayyar, J. and Sir James White, C. J.].

In *Jairam Narronji v. Visram, C.*, a Hindu, possessed of a half share in two dwelling houses, by his will, as to his share in these houses, that his two wives should have the right to reside therein as long as they might live. By a subsequent clause of his will the testator declared that, should the decease of his two wives take place, all his immovable and moveable property should go to his nephews, Vullubdás and Morárji, the sons of Visram. It was held, that the gift to the nephews created a joint tenancy, and on the death of Morárji, the survivor, Vullubdas, took the whole [see *Navroji Manockji Wadia v. Perozbai*, *supra*]. So in *Vyadinada v. Nagammal* [(1888) I. L. R. 11 M., 258], where a Hindu by his will granted jointly to his brother's son, R., and N., the wife of R., certain land with power of alienation, it was held that R. and N. were joint tenants [see *Jogeswar Narian Deo v. Ram Chandra Dutt*, (1898) I. L. R. 23 C., 670; L. R. 23 I. A. 37]. But in the last cited case, their Lordships of the Judicial Committee, observing in reference to the case of *Vyadinada v. Nagammal* (*supra*), that the judges of the Madras High Court were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing, said: "The principle of joint tenancy appears to be unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family." What their Lordships meant by this observation is, as explained by Sir Charles Farran, C. J. in *Navroji Manockji Wadia v. Perozbai*, (*supra*), "that the rule of English law (which their Lordships term an extremely technical rule of English conveyancing), that a joint tenant's interest does not descend upon his heirs, is not properly applied to a bequest in joint tenancy under a Hindu will." He accordingly held in that case that joint tenancy was created. Again, in *Bhoba Tarini Dehya v. Peary Lall Sanyal* [I. L. R. 24 C., 646; 1 C. W. N. 578], where the testator declared "My first and second wives shall together be entitled to twelve annas of all the properties left by me," the contention being that the two wives took as joint tenants with the right of survivorship, Messrs Justices Bannerjee (now Sir Gooroodas Banerjee) and Rampini observed:—"though the view contended for is in accordance with the rule of English law, yet there is not much in reason to commend it for acceptance. Where any property is bequeathed to two or more persons without any specification of shares, the natural presumption is that they are intended to take in equal shares; and when the estate bequeathed is one of inheritance, it is far more reasonable to suppose that each legatee and his heirs are the objects of the testator's bounty, than that he intends that the legatees should take by survivorship, and the heirs of the last surviving legatee should take the whole. We may observe that even in English law the leaning has been in favor of tenancy in common" [see *Mahomed Shumsool Hooda v. Shewukram*, 7 B. L. R. 700; 14 B. L. R. 226; I. R. 2 I. A. 7; 22 W. R. 409; *Rewun Pershad v. Radha Bibee*, 4 Moo. L. A. 137; 7 W. R. P. C. 35].

Where property is given jointly to two persons living as members of a joint Hindu family, each donee takes an interest in the property which passes to his heirs at his death, and not to the other donee by survivorship. Thus where certain property was given to two brothers, living in union as members of a joint Hindu family, and one of them died childless leaving a widow, it was held that the widow was entitled to a moiety of the property as heir of her husband, and

it did not pass to the other brother by survivorship. In delivering the judgment of the Court Mr. Justice Fulton said : “ By Hindu law that interest (that is, the interest obtained by the brothers) as obtained by gift would be treated as self-acquired property, and, in the absence of any direction by the donor limiting the extent of the grant, would pass on the death of the holder to his heirs. * * * *. It need not be doubted that a donor can, when making his gift, limit the interest of the donee by giving an interest by way of survivorship to any other person living at the time of the gift ; but we think * * that among Hindus when property is given to two persons jointly, there is no presumption that the donor intended to annex the condition of survivorship which might have the effect of excluding the sons of one of the donees” [*Bai Diwali v. Patel Becharadas*, I. L. R. 26 B., 445 ; 4 Bom. L. R. 102]. This was a case of gift *inter vivos*.

In 1866 the Government of the N. W. P. made a grant of a Zamindary, as reward, to four persons, J., C., N. & P. of whom the first three were members of a joint Hindu family and the last *i. e.*, P., a stranger. Soon after the grant P. got his share separated, and N. died leaving his widow, Phulla. In 1874, Phulla, jointly with J. & C. sold their share to one Nur Ahmad. In 1896 J. died. Upon this some members of the joint family including the sons of J. instituted a suit to recover possession of N's share on the allegation that his widow, Phulla, had no power to alienate more than her life interest. The decision turned upon the question, whether N's share passed to his widow by right of inheritance or to J. & C. by right of survivorship ; in other words, whether the grantee's were tenants in common or joint tenants. It was held, upon the construction of the language of the sanad by which the grant was made, that they were joint tenants and not tenants in common. As regards the fact of Phulla having joined in the sale, their Lordships (Sir John Stanley C. J. and Burdett J.) said : “ It may be that the purchaser for the sake of precaution asked that she should join in the deed, and that she accordingly executed it [*Gobind Prasad v. Inayat Khan*, I. L. R. 27 A. 310 ; All. W. N. (1904) 269]. It may be noted that the grant in this case was made to the four grantees without any specification of shares so that there was nothing to indicate that it was made in specified or equal shares.

§ 3. Joint gift and joint tenancy.—It is not clear whether there is any or what difference between ‘joint tenancy’ and ‘joint gift.’ Perhaps there is none. In *Kooldebnarain Shahee v. Wooma Coomaree* (Marsh. 357), a Hindu, governed by the Mitakshara, executed a *Mookteernamah* and a petition for mutation of names, desiring the collector of the district to substitute the names of his wife and daughter for his own name, and declared that, having no son, they “are my heirs after my death all my property will devolve on my aforesaid wife and daughter.” It was held that the gift was a ‘joint gift.’ But all gifts to two persons are not ‘joint gifts’ or gifts in joint tenancy. For, in some cases a gift to two persons may, from the context, be construed to mean a gift to one for life, with remainder to the other [see *Siva Raw v. Villa Bhatta*, I. L. R. 21 M, 425]. Thus a bequest may be made to two or more persons to take either jointly or severally—joint enjoyment being, of course, more usually intended in the case of members of a joint family.

§ 4. Application of the rule where the gift is to a class.—The doctrine of survivorship among joint tenants applies to gifts to a class, as where the gift is “to my children,” or “to the children of A”; and the death of a member of the class in the testator's lifetime does not cause a lapse of his share.

This is on the ground that a "class is held to consist of those persons who live to attain vested interests, to the exclusion of any one who may die before the testator" (1). See sections 83 (S) and 85 (S) *supra*.

The rule applies to gifts to a class, although the interests of the persons constituting the class, may not vest at the same time. Thus under a bequest to A. for life with remainder to the children of A., all the children born in A.'s lifetime will become entitled jointly, though some may not be living when the shares of the others become vested interests; and on the death of any of them before payment, the survivors will become entitled to their shares [*Mac Gregor v. Mac Gregor*, 1 DeG. F. & J. 63]. But there cannot be a joint tenancy among members of a class if some of them have vested and the others contingent interests. Therefore, if under the above mentioned bequest, the interests of the children are not to vest until they arrive at the age of twenty one, the children will take as tenants in common, although if the interests vested at birth they would take as joint tenants [*Woodgate v. Unwin*, 4 Sim. 129; *Mc Gregor v. Mc Gregor*, *supra*] (2).

§ 5. "Two persons."—The number "two" is evidently for example. It seems the legacy need not be confined to two only, but may be given to any number of persons [*Morley v. Bird*, 3 Ves. 629] (3). See sec 94 (S), *infra*, where the word "two" does not occur.

§ 6. "One of them die."—The section will apply even if the legacy to one of the joint tenants should fail from any cause other than death. Thus if A. gives a legacy to B. and C., and then by a codicil revokes the legacy to B., C. will take the whole [*Humphrey v. Tayleur*, Amb. 136] (4). So where the gift was to the daughter and to her husband jointly, and the gift to the husband failed being invalid, it was held that the daughter took the whole estate, on the principle laid down in *Humphrey v. Tayleur*, (*supra*), to the effect that, "if an estate is limited to two jointly, the one capable of taking and the other not, he who is capable shall take the whole." See *Nandi Singh v. Sita Ram* [I. L. R. 16 C., 677; L. R. 16 I. A. 44], where this principle was applied by the Privy Council, on the ground that it did not depend upon any peculiarity of the English law.

§ 7. Joint maintenance —*Prima facie*, a grant of maintenance in favour of two persons, is to be construed as providing that on the death of either the other would be entitled to only a proportionate amount [*Jogeswar Narain v. Ram Chandra*, *supra*]. But there may be cases in which there are ample indications of an intention to the contrary. Thus where the grantor provided that two ladies, mother and daughter, were to receive Rs. 650 a year, as their maintenance allowance, and that after the death of both, one-half of that amount was to be paid to the son of the daughter, should she have a son; it was held, that the grant to the two ladies was a joint grant, so that on the death of one the other was entitled to the entire sum by right of survivorship, and it would be reduced to half only in favour of the daughter's son should she have any [*Mathura Prasad v. Rukmini Koer* (1911) 17 C. L. J. 87].

§ 8. Joint authority to adopt by will.—See *supra*, Sec. 71 (S), § 3,—*Sarada Prasad Pal v. Ramapati Pal* [(1912) 17 C. W. N. 319; 16 C. L. J. 304].

(1) Hawk 69, 111; 1 Jarm. 269, 4th Edn; Wms. 1222; Edw. L of Pro. 404.

(2) Hawk. 111, 112; Wms. 1470; Theob. 358, 363, 5th Edn.; 2 Jarm. 255, 4th Edn.

(3) Stokes. 74. (4) 1 Jarm. 264, 340, 4th Edn.; 310, 5th Edn.; Bigelow. 362.

57. [94 (S)].—But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect of words showing testator's intention to give distinct shares.

Illustration.

A sum of money is bequeathed to A. B. and C. to be equally divided among them. A. dies before the testator. B. and C. shall only take so much as they would have had if A. had survived the testator.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 4. <i>The conclusion.</i> |
| § 2. <i>What creates a tenancy in common.</i> | § 5. <i>"If any legatee die."</i> |
| § 3. <i>The rule as applied to Hindu law.</i> | |

Extent of the section.

This section is extended to the Hindus, Jains, &c., to the Parsees and to the Talukdars of Oudh.

§ 1. The section.—This section is a *proviso* to the last preceding section. It is founded on the principle of tenancy in common (a) of the English law.

The essential characteristics of joint tenancy are, "unity of possession, unity of interest, unity of title and unity of the time of the commencement of such title." [See *Vyadinada v. Nagam-mal*, I. L. R. 11 M. 258]. So that, joint tenants, as between themselves and third persons, are regarded as but one individual, the possession of each being treated, in law, as possession of the whole in its entirety. Tenants in common have unity of possession only, in the sense that they hold in undivided shares: but each tenant in common is not deemed to be entitled (as in joint tenancy) to the entirety of the land. "A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate." Hence the rule of survivorship has no operation between tenants in common (1), except where there is an express clause of survivorship. See *infra*, § 4.

(a) "Tenancy in common" may be defined as ownership in community in undivided shares, accruing under different title, or by virtue of a grant in terms importing that the tenants are to hold distinct interests (2).

(1) Edw. L. of Pro. 166; see 1 Steph. 348; 2 Black. 164; Wms. R. P. 134-35.

(2) Wms. R. P. 134-39; 2 Jarm. 251, 4th Edn.; 1115, 5th Edn.

In *Malley v. Bird* [3 Ves. 29], Sir R. P. Arden, M. R. said: "Great doubts have been entertained by Judges, both at law and in equity, as to words creating a joint tenancy or a tenancy in common; and it is clear, the ancient law was in favour of a joint tenancy, and that law still prevails, unless there are some words to sever the interest taken, it is at this moment a joint tenancy, notwithstanding the leaning of the Courts lately in favour of a tenancy in common. * * * * * 'Equally to be divided,' 'equally among, between,' even in law, I believe, certainly in equity, create a tenancy in common, but without those words it is a joint tenancy."

Again, as each of the joint tenants possesses an absolute power to dispose of his own share, it is in the power of any one of such tenants to sever and destroy the joint tenancy. And when such severance takes place the unity of interest and title being destroyed what remains is unity of possession only. So that "the share which has been disposed of is at once discharged from the rights and incidents of joint tenancy, and becomes the subject of a tenancy in common" (1)

Thus, words denoting an intention to give distinct shares, are words of severance, or such as would destroy joint tenancy and create tenancy in common. Hence this section provides that, where a legacy is given to legatees in words signifying intention to give *distinct shares*, i.e., in words denoting severance, a tenancy in common is created, the result being that if any of the legatees die before the testator his share lapses and falls into the residue of the testator's property.

§ 2 What creates a tenancy in common.—In a gift to several persons or to a class, the use of the word "equally," "between," "among," "share," "respectively," or even "participate," creates a tenancy in common. [See *Re Moore's Trusts*, 31 L. J. Ch., 368; *Campbell v. Campbell*, 4 Bro. C. C. 15; *Richardson v. Richardson*, 15 Sim. 526]. So the words "jointly and equally," "to be divided," "share and share alike," or "in equal shares," will also create a tenancy in common [see *Ettricke v. Ettricke*, Amb. 656; *Heathe v. Heathe*, 2 Atk. 122; *Administrator General of Madras v. Money*, I. L. R. 15 M. 448. *Yethirajulu Naidu v. Mukunthu Naidu*, 28 M., 363; 15 M. L. J. 299]. Generally speaking, all words importing division by shares, whether equal or unequal, or referring to the legatees as holders of distinct interests, and even words simply denoting equality, will create such a tenancy (2).

Tenancy in common may also be created by *severing* a joint tenancy (3). Thus where a Hindu by his will granted jointly to his brother's son, Rangasami and Nagammal, his wife, certain land with power of alienation, and Rangasami transferred the land by a deed of mortgage, it was held that this alienation destroyed or severed the joint tenancy [*Jogeshwar Narain Deo v. Ram Chandra Dutt*, I. L. R. 23 C. 670, at 679; L. R. 23 I. A. 37, overruling *Vyadinada v. Nagammal*, I. L. R. 11 M., 258, so far as it held a contrary view; see the observations of Farran, C. J. in *Navroji Manockji Wadia v. Perozbai*, I. L. R. 23 B., 80, at 99]. Under the English law a conveyance, or even an agreement to convey by one of the joint tenants, operates as a severance [see *Jogeshwar Narain Deo v. Ram Chandra Dutt*, *supra*].

§ 3. The rule as applied to Hindu law.—Where a Hindu died leaving by his will all his property to his widow Hirabai and his adopted son Nathu

(1) Wms. R. P. 138.

(2) Hawk. 112; 2 Jarm. 257, 4th Edn.; 1121, 5th Edn.; Theob. 362, 5th Edn.; Wms. 1469-70.

(3) Wms. R. P. 138.

"as his heirs," and Nathu died intestate leaving his wife Lakshmibai in Hirabai's lifetime, and then Hirabai claimed the whole estate on the ground that she and Nathu had been joint tenants and on the death of Nathu she took his share by survivorship; in a suit by Lakshmibai claiming to be entitled to the share of her deceased husband Nathu, it was held that Hirabai took only a widow's estate in half the property, and that (subject to her right, as a Hindu widow, to a widow's estate in a half share) the entire property vested absolutely in Nathu, and on Nathu's death, subject as aforesaid, the property vested in the plaintiff, Lakshmibai, as his widow and heir, for a widow's estate. The ground on which this decision was arrived at exactly corresponds with the ground on which, in England, there is a leaning of the Courts in favour of tenancy in common. Mr. Jarman explains this leaning as "an anxiety which has been dictated by the conviction that this species of interest is better adapted to answer the exigencies of families than a joint tenancy" (1). In delivering the judgment of the Court in the above case, Mr. Justice Scott, accordingly, said: "Now undoubtedly, in the present case the tenancy-in-common interest would best answer family exigencies. A decision in favour of joint tenancy would be distinct derogation of the joint family system, which with its corollary, religious obligations, is the key stone of Hindu law. It would be, in effect, to exclude the son's family from the benefit of the testator's will and this would be in total disregard of the relations and obligations of a Hindu family. The fact of the son dying childless, is an accident which I cannot presume to have been in the testator's contemplation. Without express and explicit words to the contrary, which the will does not contain, I think I am bound to presume the testator intended to preserve the ordinary rules of devolution and the general principles of law, save so far as he departed, in terms, from them. I must hold therefore, that he desired to respect the family system, and did not intend to deprive his son's family, even for a time, of all share in the property in case his son predeceased his widow" [*Lakshmibai v. Hirabai*, I. L. R. 11 B, 69, at 77, *Hirabai v. Lakshmibai*, *Ibid.*, 573; see *Administrator General of Madras v. Money*, I. L. R. 15 M., 448; *Muthumeenakshu Ammal v. Chandra Sekhara Ayyar*, I. L. R. 27 M., 498]. So, where by a deed of partition, entered into between a father and his son by a senior wife (the junior having no issue), it was declared that the father and his junior wife should hold and enjoy certain of the family properties perpetually, with powers of alienation by sale, gift mortgage or otherwise, it was held that a tenancy in common was created, and the junior wife after the death of her husband, was entitled to a moiety of the property [*Muthumeenakshu Ammal v. Chandra Sekhara Ayyar*, *supra*].

A testator being in possession of three houses, devised his house No. 1 to his three sons creating an absolute interest therein and disposed of the income of the other two houses in these words—"Out of the total income of Rs. 530/- deducting the aforesaid expenses, Rs. 181/-, the remaining amount whatever it may be shall be divided and paid by my executors to my three sons in equal shares." As to the corpus of these two houses the testator directed that "My executors shall divide and give away these properties to my own grandsons being my sons' sons after my sons according to their respective shares. My sons shall have no right whatever to give as gift or sell these properties." The question being what was the nature of the interest given to the sons and grandsons in respect to these houses, it was held. "in equal shares" and "according to their respective shares" indicating tenancy in common, the sons and

grandsons were entitled to such interest in the income and corpus respectively. *Yethirajulu Naidu v. Mukunthu Naidu*, I. L. R. 48 M., 303; 15 Mad. L. J. 291.

A Hindu directed by his will that his only two daughters, Lila and Maya, shall after his death, "be the owners in possession of the whole of the property in my possession * * like myself." There was nothing in the will to qualify the terms of the gift. The only question being whether the gift to the daughters was a gift to them as tenants in common or as joint tenants, it was held, that they took as tenants in common and not as joint tenants [*Gopi v. Jaldhara* (1910) 33 A., 41; 7 All. L. J. 941; *Jogeswar Narain Deo v. Ram Chand Dutt* (1898), L. R. 23 I. A. 37].

Thus the result of the authorities seems to be that, the leaning of the courts here, as in England, is in favour of a tenancy in common in the construction of wills, and they will prefer it when there is a doubt [*Administrators General of Madras v. Money*, *supra*; *Lakshmi Bai v. Hirabai*, *Ibid*; *Bhaba Tarini Debya v. Peary Lall Sanyal*, I. L. R. 24 C., 646; 1 C. W. N. 678; *Damoderdas Tapidas v. Dayabhai Tapidas*, I. L. R. 21 B., 1; 22 B., 833; *Booth v. Alington*, 27 L. J. Ch. 117; *Jolliffe v. East*, 3 Bro. C. C. 25]. In *Yethirajulu Naidu v. Mukunthu Naidu*, *supra*, Sir S. Subrahmaniam Ayyar, J. says: "If, * * the grant is to persons who constitute such a family (Hindu joint family), even then it may be that the *prima facie* view is that they take in severalty and that those who argue in favour of the opposite construction have to show some clear foundation for it in the terms of the will."

§ 4. The Conclusion.—The conclusion is, that where a tenancy in common is created by a testamentary gift to two or more persons concurrently, the death of any one of the devisees or legatees, in the lifetime of the testator or before the gift takes effect, will have the effect of causing a lapse of his share, so that what is so lapsed shall fall into the residue and descend either to the residuary legatee or to the heir-at-law (1). This rule will apply, although the subject of the gift be the residue of the testator's estate. Thus if the residue be given to A., B., & C., in equal shares as tenants in common, and A. die in the lifetime of the testator, the share of A. will not pass as part of the residue, but will devolve as undisposed of. For it is a rule, as already seen, "that a lapsed share of residue cannot form part of the residue" (2). [*Skrymsher v. Northcote*, 1 Sw. 566]. See *ante* sec. 89 (S) § 4,—“Residue of residue.”

A testator bequeathed the income of his properties to 14 named persons in equal shares with a direction that on the death of any of them his share shall go to his issue. Some of these persons died during the lifetime of the testator; and some others after his death leaving no issue. The question was what was to become of the income that was to go to them and their issue. It was held that as the facts did not warrant the inference of joint gift to the legatees, there was an intestacy as to the shares of the persons who died without issue [*Re Hobson: Barwick v. Holt* (1912) 1 Ch. 627].

If, however, the gift is to tenants in common with a clause of survivorship, there will be no lapse. Thus where a testator made a gift of certain chattels to his two daughters, share and share alike, and directed that upon the death of either without issue, the share of her should go to her sister, it was held

(1) 2 Jarm. 264 4th Edn; 1128-29, 5th Edn.

(2) Hawk. 42, 43; 1 Jarm. 764, 4th Edn.; 613, 719, 5th Edn.

that one of the legatees having died unmarried in the testator's lifetime, her share did not lapse, but the survivor was entitled to the whole [*Mackinnon v. Peach*, 2 Keen 555] (1). So where the gift was in these words "unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike," it was held, the daughters were entitled to the testator's estate in equal shares for life with benefit of survivorship between themselves [*Radha Prasad Mullick v. Raneemani Das*, I. L. R. 35 C, 896, 12 C. W. N. 729, P. C., 8 Cal. L. J. 48, 5 A. L. J. 460, 10 Bom. L. R. 604, 18 M. L. J. 287, I. R. 35 I. A. 118].

But if the gift be to a class of persons, whether as joint tenants or tenants in common, the death of a member of the class during the testator's lifetime, will not cause a lapse of his share (2). See sec 98 (S), *infra*

§ 5. "If any legatee die".—Here also, it seems, as in the last preceding section, the failure of the gift may be from any cause other than death. Perhaps the words "if any legatee die" mean,—if any legatee become incapable of taking for any reason [see *Camani v. Barefoot*, I. L. R. 26 M., 433; *Humphrey v. Tayleur*, Amb. 130, *In re Coleman*, L. R. 4 Ch. D. 165, see also *Skrymsher v. Northote*, *supra*] (3).

38. [95 (S)].—Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

When lapsed share goes as undisposed of.

Illustration

The testator bequeaths the residue of his estate to A, B, and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. "Lapses."

Extent of the section.

This section is extended to the Hindus, Jains, &c., to the Parsees and to the Talukdars of Oudh.

§ 1. **The section.**—This section seems to be based on the principle laid down in *Skrymsher v. Northote* [*supra*] (4). In that case Sir J. Plumer,

(1) 2 Jarm. 763, 4th Edn., Hawk. 244

(2) Theob. 690, 5th Edn.

(3) 2 Jarm. 263, 764, 4th Edn.

(4) The facts of this case are given in Sec. 89 (S) § 3, *supra*

M. R. said: "A part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts, as a residue of residue; but instead of resuming the nature of residue, devolves as undisposed of." [See *Lloyd v. Lloyd*, 4 Beav. 231] (1).

§ 2. "Lapses."—A share will lapse when it is void. Thus where a testator made a gift of one-third share of the residue of his estate to the wife of an attesting witness to his will, such gift being void under section 54 of the Succession Act, it was held that that share should be dealt with under this section as if it were undisposed of [*The Administrator General of Madras v. Lazar*, I. L. R. 4 Mad. 244].

39. [96 (S)].—Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the lifetime of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son B, for his own absolute use and benefit. B dies before A, leaving a son C who survives A, and having made his will whereby he bequeaths all his property to his widow D. The money goes to D.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 5. "Issue" or "lineal descendant." |
| § 2. <i>Its origin.</i> | § 6. "Shall die." |
| § 2a. <i>Its requisites.</i> | § 7. "Contrary intention." |
| § 3. <i>Effect of the section.</i> | § 8. <i>Where the section does not apply.</i> |
| § 4. "Child." | |

Extent of the section.

This section is extended to the Hindus, Jains, &c., to the Parsees and the Talukdars of Oudh.

§ 1. **The Section.**—This section corresponds to section 33 of the English Wills Act (Sta. 1 Vict c. 26), which enacts, "That where any person,

(1) Hawk. 42; Hend. 205; Wms. 1466; 1 Jarm 764, 4th Edn.; 719, 5th Edn.; Theob. 211, 5th Edn.

being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall survive at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

It appears that the words "lineal descendant" have been substituted for the word "issue" in the English Act.

§ 2. Its origin.—The origin of this section is traceable to the intention of the Legislature in England, to benefit children by preventing a portion (1) given to a child by the testator from being lapsed by the death of such child before the testator. This was done as an act of humanity to give effect to the intention of an affectionate father [*Winter v. Winter* (1846) 5 Ha. 306]. It is to be remembered that lapse is not prevented by the property being given to the devisee with the words "and his heirs," (e.g. to A and his heirs), for such words being words of limitation, do not convey the property to those heirs. See *supra* sec. 84 (S).

§ 2a. Its requisites.—The requisites under this section to prevent lapse, are the following :—

- (1) A gift by the testator to A., "child or other lineal descendant" of the testator ;
- (2) The death of A. in the testator's life-time leaving "lineal descendant ;"
- (3) The survival of some of A.'s lineal descendants, (not necessarily any of those left at his death), beyond the death of the testator. See *infra*, § 5.

§ 3. Effect of the Section.—It has been held in England that the effect of the above provision (the provision of this section) is not to substitute for the intended legatee or devisee the "issue" (or "lineal descendant") who survives the testator ; but it is to vest the subject of the gift in the predeceased legatee or devisee, in the same manner as if the death of such legatee or devisee had happened immediately after that of the testator, with the result that the said subject becomes to all intents and purposes, the disposable property of the deceased legatee and as such passes under his will, or in case of his intestacy, to his representatives [*Johnson v. Johnson*, 3 Ha. 157 ; *In re Parker*, 1 Sw. & Tr. 523] (2). The legacy vests not in the issue or descendant who survives the testator, but in the deceased legatee because such legatee is in the contemplation of law a person in existence at the time of the testator's death [*Jitu Lal Mahta v. Bindu Bibi*, I. L. R. 16 C., 549]. In *Shama Churn Kundu v. Khetromoni Dasi* [I. L. R. 27 C., 526, 527], if Bhut Nath had been the son of the testator, the representative of Bhut Nath would have received his share under this section [see *Ramamirtham v. Ranganatham*, I. L. R. 24 M., 299]. "The effect of the section," says Mr. Jarman, "is to prolong the original legatee's life by a fiction for a particular purpose ; that purpose is to give effect to the will in which the gift which would otherwise lapse occurs, and it only points out the mode in which that effect is to be given. Thus the subject of gift devolves with any obligation to which, under that will, it would have been subject in the hands of

(1) See *post*, sec. 165 (S).

(2) Wms. 1227, 1229 ; 1 Jarman. 354, 4th Edn. ; 324, 5th Edn. ; Theob. 689, 5th Edn.

the deceased donee if he had survived, as an obligation to compensate other legatees under the will, disappointed by his assertion of rights that defeat their legacies" [*Pickens v. Pickens*, 5 Ch. D. 163] (1).

§ 4. "Child."—The word 'child' includes an adopted child (section VI., ante), and also a child in embryo [*Tugore v. Tugore*, 9 B. L. R. 377; 18 W. R. 359; 4 B. L. R. 103], or a child *en ventre*.

§ 5. "Issue" or "lineal descendant."—The issue (or lineal descendant) who was alive at the death of the legatee, may not be the same issue who survives the testator. Any one, a grand-child of the legatee, for instance, living at the death of the testator will be sufficient to prevent the lapse [*In re Parker*, 1 Sw. & Tr. 523] (2).

The words "sons and grandsons" are equivalent to the word "heirs" under English law. [*Ramamirtham v. Ranganatham*, 1 I. L. R. 24 M., 299, at 305].

§ 6. "Shall die."—The legatee may die before or after the date of the will. That is to say, the section will apply to a gift to a child who happens to be dead even at the date of the will [*Wisden v. Wisden*, 2 Sim. & Gif. 396; *Mower v. Orr*, 7 Ha. 473, see *Shama Charan Kundu v. Khettrmoni Dasi*, 1. L. R. 27 C., 521 at 527] (3).

§ 7. "Contrary intention."—A testator bequeathed a sum of Rs. 5000, to his son's daughter, Jodha Bibi, who predeceased him, leaving Binda Bibi, the plaintiff, who survived the testator. The testator also bequeathed by the same will, a sum of Rs. 7000, to his brother Ram Charan Lal, with the direction that if he (Ram Charan) be dead, the legacy should pass to his sons and grand-sons in consideration of their being the heirs of Ram Charan Lal. In a suit by Binda Bibi to recover the legacy that had vested in her mother Jodha Bibi, under this section, it was held that, in the bequest to Jodha Bibi, the absence of a provision similar to that in the bequest to Ram Charan to the effect that if he be dead the legacy would go to his sons and grand-sons, did not indicate a contrary intention [*Jitu Lal Mahata v. Bindu Bibi*, 1. L. R. 16 C., 549]. See sec. 99 (S) § 3, *post*.

§ 8. "Where the section does not apply."—It does not apply to a devise or bequest to the testator's children, or issue, as joint tenants, or as a class. [See *Olney v. Bates*, 3 Drew. 319; *Holy Land v. Lewin*, L. R. 26 Ch. D. 266; *In re Sir E. Harvey's estate*; *Harvey v. Gillow* (1893) 1 Ch. 567] (4).

40. [97 (S)].—Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

Bequest to A for the benefit of B does not lapse by A's death in testator's lifetime.

(1) Wms. 1228; Theob. 689-90, 5th Edn.; Hend. 204; 1 Jarm 354, 4th Edn.; 324, 5th Edn.

(2) Wms. 1229; 1 Jarm. 353, 4th Edn.; 323, 5th Edn.; Theob. 689, 5th Edn.

(3) See 1 Jarm. 354, 4th Edn.; 323, 324, 5th Edn.; Theob. 689, 5th Edn.

(4) Theob. 689, 5th Edn.; Wms. 1228.

NOTES AND COMMENTARIES.

§ 1. "Bequest to one person for the benefit of another." — "Bequest to trustee not void by the death of cestui que trust."

Extent of the Section.

This section is extended to the wills of the Hindus, Jains, &c., to those of the Parsees and also of the Talukdars of Oudh.

§ 1. "Bequest to one person for the benefit of another," &c.—

The meaning is, that the death of the legatee or devisee in the lifetime of the testator, will not cause a lapse to the injury of the person for whose benefit the bequest or devise is made. Where, for instance, a devise is made to one charged with a sum of money in favour of another, the charge will not be affected by the lapse of the devise by the death of the devisee. Thus if an estate be devised to A. on condition that he should pay a legacy of Rs. 500, to B., and if A. dies in the lifetime of the testator, B. will not be deprived of his legacy, for, the testator's heir-at-law or residuary legatee, as the case may be, will take the estate charged with the said sum [*Wigg v. Wigg*, 1 Atk. 382; *Oke v. Heath*, 1 Ves. Sen. 134].

So where a bequest is made to A. in trust for B., the legacy to B. will not lapse by the death of the trustee A., in the lifetime of the testator [*Eales v. England*, 2 Verm. 468]. But the legacy in these cases will fail if the gift to A. i.e., the trustee, be revoked or adeemed [*Cowper v. Mantell*, 22 Beav. 223]. On the same principle where land was devised to a creditor on condition that he should, within three months after the testator's death, release his (testator's) debt, and the testator declared that the debt should not be paid out of the residue, and the creditor predeceased the testator, it was held that although there was a lapse of the devise to the creditor, the debt was a charge on the land and it must be paid from it [*In re Kirk*; *Kirk v. Kirk*, 21 Ch. D. 431] (1).

§ 2. Bequest to trustee not void by the death of cestui que trust.—If, on the other hand, the person for whose benefit the bequest is made, die in the testator's lifetime, the bequest (i.e., the legal estate *) will vest absolutely in the legatee; so that, a bequest to a trustee will not be void because of the death of the cestui que trust in the lifetime of the testator. Thus if A. devise land to B. upon trust to receive the rents and profits and pay them to C. for life, and then upon trust to convey that land as C. by will should appoint, and C. dies in the life time of A., the legal inheritance will pass to B. [*Doe v. Eldin*, 4 A. & E. 582]. So where a devise was made to A. charged with a legacy to B., provided B. should attain the age of twenty-one, and B. died during his minority, it was held that the devise vested absolutely in A. Lord Eldon said: "The devise is absolute to A., unless B. attain the age of twenty-one: if he does, he is to have the legacy. But his attaining the age of twenty-one is a condition, upon which alone he is to have it; and, if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir-at-law does not come in, because the whole is absolutely given to the devisee" [*Tregonwell v. Sydenham*, 3 Dow. 194] (2).

* See n. (a) p. 66, ante

(1) Theob. 688, 5th Edn.; Hend. 199, 204-5; 1 Jarm. 345. 4th Edn.; Wms. 1229.

(2) 1 Jarm. 345 4th Edn.; 315, 5th Edn.; Hend. 205.

41. [98 (S)].—Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

Survivorship in case of bequest to a described class.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.

Compare this with the *exception* appended to sec 99 (S), *infra*

Illustrations

(a) A bequeaths 1,000 rupees to 'the children of B' without saying when it is to be distributed among them. B had died previous to the date of the Will, leaving three children, C, D and E. E died after the date of the Will but before the death of A. C and D survive. A: The legacy shall belong to C and D, to the exclusion of the representatives of E.

(b) A bequeaths a legacy to the children of B. At the time of the testator's death, B has no children. The bequest is void.

(c) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator B had two children living, C and D, and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E his executor. D has survived A. D and E are jointly entitled to so much of the leasehold term as remains unexpired.

(d) A sum of money was bequeathed to A for her life, and after her decease to the children of B. At the death of the testator B had two children living, C and D, and after that event, two children, E and F, were born to B. C and E died in the lifetime of A, C having made a Will, E having made no Will. A has died, leaving D and F surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E, and one to F.

(e) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that event another sister E was born. C died during the lifetime of B, D and E have survived B. One third of A's lands belongs to D, E, and the representatives of C, in equal shares.

(f) A bequeaths 1,000 rupees to B for life, and after his death equally among the children of C. Up to death of B, C had not had any child. The bequest after the death of B is void.

(g) A bequeaths 1,000 rupees to 'all the children born or to be born of B, to be divided among them at the death of C.' At the death of the testator, B has two children living, D and E. After the death of the testator, but in the lifetime of C two other children, F and G are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F, and G, to the exclusion of the after-born child of B.

(h) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C. He afterwards had two other children, named D and E. E died, but C and D were living when C attained majority. The fund belongs to C, D, and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority.

NOTES AND COMMENTARIES.

- § 1. *The section.*
 § 2. *Child en ventre in a class.*
 § 3. *General view of the law of gifts to a class.*
 § 4. *Period of ascertainment of the class.*
 (1) *Ascertainment at testator's death.*
 (2) *Ascertainment at a period later than the testator's death.*
 § 5. *By reason of a prior bequest otherwise.*
 § 6. *the rule by express*
 § 7. *"Simply to a described class."*
 § 8. *"Described class."*
 § 9. *Immediate bequest.*
 § 10. *Period of distribution.*

Extent of the section.

This section is extended to the Hindus, Jainas, &c, to the Parsees and to the Talukdars of Oudh.

§ 1. **The section.**—According to English law in a gift to a class, the distribution among the members of such class, depends upon whether the gift is a gift to each member of the class specifically,* as Rs. 100/ to each of the children of A., or whether it is a general gift among all the members as Rs. 1000 to be divided equally among those children. In the latter case, it depends again upon whether the gift is to take effect immediately upon the death of the testator, or is postponed to some later date (1). The distinction between immediate and postponed gifts having, therefore, no operation in case of specific gifts, it is clear that this section lays down the rule as applicable to immediate gifts only, as a general rule, postponed gifts forming an exception to it, in order, perhaps, as Mr. Justice Pontifex says, "to assimilate the law here to that which exists in England" [*Masseyk v. Fergusson*, I. L. R. 4 C., 670, at 673]. According to Mr. Justice Wilson (now Sir Arthur Wilson) this section "deals amongst other things with the construction and operation of a gift to a class, some of whom come into existence between the death of the testator and the time when the gift takes effect" [*Alongmanjari v. Sonamani*, 8 C. 157, 637]. (See exception).

The general rule laid down in the section is quite clear and simple. But great difficulties often arise in the construction and operation of gifts to a class which are postponed, or those which come under the operation of the *Exception*, especially where after a life interest to A. there is a gift to the children of B. with or without conditions as to age, &c. It will thus appear that by attempting to condense too much into a single sentence (*Exception*) the Legislature have made "the section, with its exception, * * * not very happily expressed" as Mr. Justice Pontifex says [*Masseyk v. Fergusson*, *supra*].

§ 2. **Child en ventre in a class.**—In gifts to children as a class, the word 'children' includes children *en ventre sa mere* (in their mothers' womb). The rule is, that "A devise or bequest to children 'born' or to children 'living' at a given period, includes a child *en ventre* at that period, and born afterwards"

* See *Rogers v. Mutch* [10 Ch. D. 25], where E. H. bequeathed "the sum of 100l. to each of the children of my niece E. M., who shall live to attain the age of 23 years." At the death of E. H., E. M. had no children. It was held that no sum need be set aside for the children of E. M. for no children born to E. M. after the death of E. H., the testator, could be entitled to take under the gift.

[see *Okhoy Money Dasee v. Nilmoney Mullick*, I. L. R. 15 C., 282; *Villar v. Gilbey** (1906) 1 Ch. 583; (1907) A. C. 139; *In re Salaman: De Pass v. Sonnenthal* (1908) 1 Ch. 400 (C. K.)]; for, it is now established that a child *en ventre* (a) is to be considered as a child in existence for all purposes which may conduce to its own benefit [*Clarke v. Clarke*, 2 H. Bl. 399] (1), and that the words 'living' and 'born' are synonymous with 'procreated.' This is not because such a child can strictly be regarded as answering the description of a child living, "but because the potential existence of such a child places it plainly within the reason and motive of the gift" [Leach, V. C. in *Trower v. Butts*, 1 S. & Stu. 181] (b). If, however, there is no clear indication that such children are designated by the testator as legatees, the rule will not apply [see *Srinivasa v. Dandayadapani*, I. L. R. 12 M., 411].

In *In re Salaman; De Pass v. Sonnenthal* (*supra*), where the testator bequeathed some property in favour of his grandnephews "born before the date of this my will," it was held that a grand-nephew who was only *en ventre sa mere* at that time, was not entitled to the bequest.

§ 3. General view of the law of gifts to a class.—The view of the law in accordance with which the rule is declared in this section, has been thus explained by Wilson J. (now Sir Arthur Wilson). "In dealing with a gift to a class you enquire first, at what period the class is to be ascertained (1)—it may in the case of a will, be on the death of the testator or at a later period. If the class is to be ascertained on the death of the testator, no question of remoteness can arise, and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is deferred to a later date, those who become members of the class within the extended period are admitted; and subject to any question of remoteness those who are then capable of taking, take. In either case, if any members of the class are incapable of taking, because born after the date of ascertainment, they are simply excluded, and the rest take the whole; and this is so even if the gift be to persons born and to be born [*Sprackling v. Ranier*, 1 Dick. 344; *Ayton v. Ayton*, 1 Cox. 327; *Whitbread v. Lord St. John*, 10 Ves. 152; *Mann v. Thomson*, Kay, 638]. If any die in the testator's lifetime they are simply excluded, and the rest take the whole [*Stewart v. Sheffield*, 13 East.

* In this case the House of Lords expressed an opinion to the effect, overruling that of the Court of appeal, that there was no fixed rule of construction which compels a Court to hold that a child is born in the lifetime of the deceased testator, if at that time he was *en ventre sa mere*.

(a) According to English law a gift to a class which might include some future illegitimate children is void on ground of public policy which prevents provision being made for future illegitimate children. But where such child is *en ventre* and is intended to be a member of the class the gift is not void. Thus where the question was whether under a settlement in favour of one E. K. described as the wife of J. K. (she had undergone the ceremony of marriage with him but it was invalid) for life, remainder to her children, a child of the said E. K. by J. K. *en ventre* at the time of the settlement could take, it was held that he could as he was one of the class intended to be benefited and in existence at the time of the settlement. In this respect there is no difference between a deed and a will [*Ebborn v. Fowler* (1909) 1 Ch. 578. *In re Shaw* (1890) 44 Ch. D. 94, overruled].

(b) This fiction of the law applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to; and it is limited to cases where the benefit of the child itself is in question [*Villar v. Gilbey*, *supra*; *Blasson v. Blasson* (1864) a D. J. and S. 665].

(1) See *infra* § 4.

526; *Re Coleman*, L.R. 4 Ch. D. 167.] If the gift to one is revoked by codicil, he is simply excluded, and the rest take the whole [Shaw v. McMahon, 4 Dr. & W., 431.] If one is incapacitated from testating because he has attested the will [sec. 54 (S)], he is simply excluded, and the rest take the whole [Young v. Davies, 2 Dr. & S., 167; *Fell v. Biddolph*, L. R. 10 Ch. D. 101.] (1).

§ 4. **Period of ascertainment of the class.**—As a general rule, all gifts convey either a present title and interest and a present right of enjoyment, or a present interest but future enjoyment, or a contingent interest both as regards title and enjoyment, that is, where neither title nor right of enjoyment is present but both depend upon future uncertain events. This being so, and, inasmuch as a class of persons is necessarily a fluctuating body, the first (as seen above) and the most important question in a gift to a class relates to the determination of the time at which the class is to be ascertained. If, for instance, A. bequeaths a sum of money to the children of B. without saying when it is to be distributed, or at what period of time such children are to be ascertained, the question will naturally arise whether the members of the class are to be ascertained at the death of A. or at the death of B., or in other words, whether the intended legatees are such children of B. as will be existent at A.'s death or at B.'s death. Again, if there be a bequest to A. for life, and after his death to the children of B., and if B. has two children living at the testator's death, and two more children be born to him during the lifetime of A. but after the death of the testator, the question will be whether all the four children of B. or only those living at the time of the testator's death, are entitled to the legacy. Similarly, if the bequest is to the children of B. to be divided among them when the eldest attain majority, and if B. has only two children when the eldest attain majority, one of whom was born after the testator's death, the point for determination will be whether the legacy will go to both or to one only.

Thus the question resolves itself into whether the ascertainment is to be made at the testator's death or at a later period.

(1) **Ascertainment at testator's death.**—The question is, in a gift to a class, under what circumstances are the members of the class to be ascertained at the time of the testator's death?—The rule in the first part of the section sufficiently answers this question. That rule deals with immediate gifts (2) and purports to lay down, that a devise or bequest to the children of A., or of the testator, *prima facie* means the children in existence at the testator's death; in other words, where the devise or bequest to a class is immediate, the members of the class intended to be benefited are to be ascertained at the time of the testator's death [*Viner v. Francis*, (1789) 2 Cox. 190; *Davidson v. Dallas*, 14 Ves. 576; *Mann v. Thompson*, Kay. 638; *Hill v. Chapman*, (1791) 1 Ves. J. 405; *Russell v. Russell*, (1887) 84 Ala. 48; *Campbell v. Rawdon*, (1858) 18 N. Y. 412; *Howland v. Slade* (1891) 155 Mass. 415; see *In re Powell*, *Crosland v. Halliday*, (1898) 1 Ch. 227] (3). Thus it follows that the rule does not apply where there is no member of the class in existence when the instrument of gift comes into operation. Hence the section declares,—“the thing bequeathed shall go only to such as shall be alive at the testator's death” [see *Javerbai v. Kablibai*, I. L. R., 15 B. 326; 16 B. 492].

(1) See *Ram Lal Sett v. Kanai Lal Sett*, I. L. R. 12 C., 663, at 679.

(2) See § 8, *infra*.

(3) Wms. 1094; Hawk. 63; Theob. 227, 5th Edn.; Shep. T. 446; Bigelow, 280, 284; Underhill. 80, 82; 2 Jarm. 155, 4th Edn.; 1010, 1013, 5th. Edn.

This is the general rule (1) which is based on the principle of early vesting according to which the subject-matter of the gift is to vest in the devisee or legatee at the earliest possible moment.

(2) **Ascertainment at a period later than the testator's death.**—

This is what the exception appended to the section deals with. The question of ascertainment of the class at a period later than the testator's death arises when the possession or enjoyment of the thing bequeathed is postponed either, (a) "by reason of a prior bequest," or (b) "otherwise."

(a) **"By reason of a prior bequest."**—That is to say, when the possession or enjoyment is postponed by reason of the interest being a reversionary* one, or a remainder † following a life estate. In such cases the rule is,—“A devise or bequest * * * * * to children as a class, where the gift is *not immediate*, vests in all the children in existence at the death of the testator [see *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207; *Advocate Gen. Bombay v. Karmali* I. L. R. 29 B., 133; 6 Bom. L. R. 601], but so as to open and let in children subsequently coming into existence before the period of distribution” (2). In other words, when the gift is postponed by reason of a prior bequest, all persons who are members of the class at the time the instrument comes into operation (*i.e.*, at the testator's death), and also those who become members of it before the period of distribution, “belong to the class in whose favour the gift accrues” [*Andrews v. Partington*, 3 Bro. C. C., 401; *In re Emmets estate*, 13 Ch. D., 484; *Budd v. Haines* 52 N. J. Eq., 488; *Ridgeway v. Underwood* 67 Ill., 419] (3); such class being ascertainable at a time later than the testator's death, that is, at the postponed period of enjoyment, or as it is termed the period of distribution. Thus where the bequest is to A. for his life, and after his death to the children of B., the children of B. living at the death of the testator together with those born afterwards during the lifetime of A., are entitled to the thing bequeathed. This is so, because the children of

(a) *The reason of the rule.* “This rule excluding as it does from the class to be benefited any child born after the period of distribution, may be explained by the attempt of the Court to reconcile two inconsistent directions, namely, that the whole class should take and also that the fund should be distributed among them at a time when the whole class could not be ascertained (for the members might be increased by births after the testator's death). The rule which was intended as a solution of the difficulty, may be said to be a cutting of the knot rather than an untying; and though it has been called a rule of convenience (see *infra* n. to (b) “or otherwise”), must be very inconvenient to those children who may be born after the period of distribution” [*In re Wenmoth* (1887), 37 Ch. D. 266; See *Howland v. Howland* (1858), 11 Gray (77 Mass.) 469]. The rule being thus based on the inconvenience which would result from suspending the distribution till the class would be complete, it is easy to see that it applies whenever distribution would be interfered with by waiting, and does not apply if all could be included without delaying distribution.—See *infra* (b) “or otherwise.”

* An interest in *reversion*, or simply a *reversion*, is that estate which remains in an owner, upon the grant of a part of his estate to another person. If, for instance, A. grant an estate to B. for life or for years, that estate which will revert to A. after the death of B., or on the expiration of the term of years, is the estate in reversion, or A.'s reversionary interest. In a reversion, the estate which is granted must be less in quantity or smaller than what the grantor holds. A reversion arises by operation of law as a consequence of the grant of an estate of less extent than that of the grantor. If in the above example, the grant, after the death of B., be to C. and his heirs, the interest of C. will be a remainder (4).

† See sec. 106 (S) note to illus. (c).

(1) Wms. 1094; 1 Jarm. 799, 4th Edn.; 756, 5th Edn.

(2) Hawk. 71, 72.

(3) Underhill. 81; Bigelow. 285

(4) See Wms. R. P. 243, 244; 1 Steph. 310; 2 Black. 149.

B. living at the death of the testator "take an immediately vested interest in their shares, subject to the diminution of those shares (*i.e.*, subject to the liability of being divested *pro tanto*) as the number of objects is augmented by future births [*Oppenheim v. Henry*, 10 Hare, 441; *Baldwin v. Rogers*, 3 D. M. & G. 649], during the life of the tenant for life; and consequently on the death of any of the children during the life of the tenant for life, their shares devolve to their respective representatives" [*Middleton v. Messenger*, 5 Ves., 136; *Barnaby v. Tassell*, L. R. 11 Eq., 363; *Att.-General v. Crispin*, 1 Bro. C. C. 386] (1).

It seems to be clear, therefore, that the operation of the rule as regards transmissibility rests on the ground of the property being vested in interest in some one of the members of the class at the time of the testator's death. [see *Radha Prasad Mullick v. Ranimoni Dasi* (1910) 15 C. W. N. 113 (2)]; so that if the thing bequeathed does not vest in any of the children at that time, his share will not devolve on his representatives. Thus where a Hindu made a bequest in these words:—"I bequeath to my eldest daughter Rs. 25,000, subject to the condition that she shall invest the same in lands * * * shall enjoy the produce * * * and shall transmit the *corpus* intact to her male descendants; and within a month after the testator's death that daughter was delivered of a son, who and its mother died in a few months, and the husband of the daughter claimed the legacy as heir to his deceased son; it was held, that as the daughter's son never acquired a vested interest in the bequest, his share did not devolve on his representative (the father) and the suit was dismissed [*Srinivasa v. Dandayudapani*, I. L. R. 12 M. 411].

It is not to be understood, however, that the legacy will be transmitted to the representatives of those only who are alive at the testator's death. But it will be transmitted "to the representatives of any of them (*i.e.*, of the class) who have died since the death of the testator," whether they were born before or after his death. This is on the ground that the gift being to a class, the vesting of the property in any one of such class is supposed to extend to all the members of that class who come into existence before the period of distribution; or because, as already seen, the persons living at the testator's death "take an immediately vested interest in their shares, subject to the diminution of those shares as the number of objects is augmented by future births during the lifetime of the tenant for life" (a). See the judgment of Sir L. Jenkins, C. J. in *Radha Prasad Mullick v. Ranimoni Dasi*, 15 C. W. N. 113.

(a) Suppose A. bequeaths a sum of money to B. for life, and after his death to the children of C.; here if up to the death of B. no child is born to C., the bequest to the children of C. is clearly void [illus. (f)]. But if after the death of A. but before that of B., two children, D. and E., are born to C., what would be the result? would not the legacy then go to D. and E., the children of C., who were not in existence at the death of the testator? It is submitted, it would not, and for these reasons: First, because the gift is one to unborn persons; secondly, because, if C. has no children living at the testator's death, the gift to his children becomes a contingent interest (contingent remainder rather), to which this section does not apply according to what Mr. Justice Pontifex seems to hold [*Maseyk v. Fergusson* I. L. R. 4 C., 304. at 313]. Besides, it must be remembered that this section contemplates deferred possession, and not deferred vesting; so that it cannot be made applicable to cases where no member of the class is alive at the testator's death.

But then, illustration (f) seems to indicate that if the children of C. though born after the testator's death, are alive at the death of B., the life tenant, the legacy will go to them.

(1) Hawk. 72; Bigelow. 286; 2 Jarm. 157, 4th Edn.; 1011, 1012, 5th Edn.; Hend. 212; Theob. 278, 5th Edn.

(2) Hawk. 72.

(b) "Or otherwise."—This is, when the possession or enjoyment is postponed, not by reason of a prior bequest, but by reason of the conditions attached to the gift. These conditions are such as may affect different members of the class at different times; as for instance, where the share of the several members of the class may vest or become payable at different times [*Gillman v. Daunt*, 3 K. & J. 48]. In such cases the point of time for ascertaining the member of the class cannot arrive until the event on the happening of which the condition is based, happens; but as such event may happen more than once, the question is, which happening is the one to be fixed upon. Hence the rule is,—“where there is a bequest to children as a class, and the share of each child is made payable on his attaining a given age or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and the children coming into existence after that are excluded” [*Andrews v. Partington*, 5 Bro. C. C. 401; *Whitebread v. Lord St. John*, 10 Ves. 152; *In re Mervin: Mervin v. Crossman* (1891) 3 Ch. 197, at 202]. If, therefore, the event named is the attainment of a given age by the members of the class, the gift will embrace those only who are alive at the death of the testator, and those also who come into existence before the first child attains the prescribed age. Thus where a testator bequeathed the residue of his property “unto all the children of A equally, when they shall severally attain the age of twenty-five years,” it was held, that the gift included all the children born before one of them attained twenty-five, though born after the testator’s death, but did not include those born after one attained the age [see *Hughes v. Hughes*, 3 Bro. C. C. 352, 434; *Hubbard v. Lloyd*, 6 Cush. 522; *Ayton v. Ayton*, 1 Cox. 327; see also *Watson v. Young*, L. R. 28 Ch. 436; and *Oppenheim v. Henry*, 10 Hare. 441] (1). So where a testator gave his residuary estate to trustees upon trust to invest and “to pay, transfer, or divide the same unto, between, or among the children of my brothers A, and B, respectively,” to be paid and divided among them on certain conditions, that is to say, “the shares of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the shares of each daughter to be paid to her or them on her or their respectively attaining that age, or previously marrying;” and after the death of the testator, but before the period of distribution, a son was born to B; it was held that the after born son of B was entitled to participate as a member of the class. [*Maseyk v. Ferguson*, I. L. R. 4 C. 670].

This rule is merely a rule of convenience. Jessel, M. R., explains it thus: “There has been established a rule of convenience not founded on any view of the testator’s intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made

If this is correct, its explanation must be sought in the English law of ‘Remainders,’ according to which the gift to the children of C, which though at first a contingent remainder, subsequently becomes, on the death of B, a vested remainder (2).

As to the question whether the inclusion of an unborn person into a class renders the disposition wholly void, see section 102 (S) *post*.

The prior bequest may be for life or no life. If it is for life, it may be for one or more lives [*Mangaldas Permanandas v. Tribhubandas*, I. L. R. 15 B. 652; *Faverbai v. Kablibai*, I. L. R. 16 B. 492; 15 B. 326]; but where it is not for life it must be determinable otherwise than by death, as by bankruptcy [*In re Smith*, 2 Johns. & H. 594; *In re Aylwin*, L. R. 16 Eq. 590] (3).

(1) Hawk. 75; Bigelow. 287; Underhill, 81, 85, 88; 2 Jarm. 160, 166, 4th Edn.; 1015, 5th Edn.

(2) Wms. R. P. 269.

(3) 2 Jarm. 157, 4th Edn.; 1011, 5th Edn.; Bigelow. 285; Theob. 278, 5th Edn.

payable by preventing any child born after a certain time from participating in the fund. The rule is that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased" [*In re Emmets Estate*, L. R. 13 Ch. D. 484, at 490] (a).

Where the gift is partly immediate and partly postponed, for the purpose of determining the time at which the class is to be ascertained, such gift will be regarded as immediate [*Hill v. Chapman*, 3 Bro. C. C. 391] (1).

For the application of the foregoing rules it is not necessary that the bequest should be made directly by the testator. The rule equally applies to gifts by way of appointment. Where, for instance, a testator bequeathed the residue of his personalty in trust for his wife for life, and after her death to such of his two daughters, and such of their children as she should by will appoint, desiring her "to provide for such child or children as may hereafter be born of my said two daughters," it was held, that the children born in the lifetime of the testator's wife (the life tenant) were entitled to the legacy [*Paul v. Compton*, 8 Ves. 375; see *Javerbai v. Kablibai*, I. L. R. 15 B. 326; 16 B. 492] (2).

§ 5. Exclusion of the rule by express words.—The above rules do not apply where the testator himself has expressly fixed the period of ascertaining the objects of his bounty by the use of such words as "now living" or "living at A's death," or such other words. Where, therefore, it appears from express declaration, or clear inference upon the will, that the testator intended to confine his bequest to those only who answer the description *at the date of the will*, such intention must be carried into effect [*Sherer v. Bishop*, 4 Bro. C. C. 55; *Palmer v. Denham* (1890) 125 N. Y. 68] (3). So where the bequest is "to all grand-children now born or hereafter to be born during the lifetime of their respective parents," it is easy to see that the period during which the class is to be ascertained is, by the testator's express declaration, "the lifetime of their respective parents" [*Scott v. Lord Scarborough*, 1 Beav. 154] (4).

§ 6. "Simply to a described class."—These words seem to convey the idea of a simple description of a class of persons as by the word "children"

(a) The effect of this rule is to "close" the class at the earliest possible time, namely, the period when a member of the class first becomes entitled to demand payment of a share. Suppose for instance, the gift is to the children of A. who attain twenty-one, equally, to take effect immediately on the death of the testator. According to this rule when the first of A's children attains twenty-one the class is "closed," and only those then born can become members of it. The effect of this being to fix the minimum share of the eldest child, such child can be paid at once. The inconvenience of keeping the class open any longer will be seen when it is considered that A might have children years afterwards, and that until his death it would not be possible to fix the minimum share of each "so that, payment of all would have to be postponed, and the testator's executors would have to hold the property at least until A's death, and could not safely pay a share to a member of the class *prima facie* entitled to demand it. By closing the class when some member first attains twenty-one the share of each cannot be less than the share proportioned to the number of children then living, but may, of course, become greater by the death under twenty-one of any prospective member then living" (5). The principle applies to a plain gift to the children of A., *i.e.* without any condition as to age &c.

It may be remembered that where no inconvenience is caused this rule does not apply.

(1) Underhill. 85.

(2) 2 Jarm. 180, 4th Edn.; Bigelow. 297; Underhill. 83.

(3) 2 Jarm. 154; Wms. 1093.

(4) Underhill. 84.

(5) Mathew, 172-173.

only, without any additional description or qualification, or, as distinguished from such description as "standing in a particular degree of kindred to a specified individual" (see exception).

§ 7. "**Described class.**"—That is, described as a *class* or group of persons denoted by a common name, such as "children." For instance, a gift to the children of A, namely B, C, and D, is not a gift to a *described* class. Similarly, a gift to A and his children, or to A's children and B's children, is not a gift to a *described* class (1). Thus where a testator bequeathed certain property to his grand daughters in these words: "I give the said house to my grand-daughters, three persons by name, Sirubaiand Kulsam and Bachuli," it was held, that the gift was not a class gift, that is, a gift to a *described* class [*Sallay Mahomed-Jaffer v. Lady Janbai*, 3 Bomb. L. R. 785; see also *Administrator General of Madras v. Money*, I. L. R. 15 M. 448]. See sec. 85 (S) §§ 1 and 4, *supra*.

In gifts to a class, a gift to "children" *simpliciter*, is equivalent to a gift to *all* the children or to "all and every" the children [*Administrator General of Madras v. Money*, *supra*; *Singleton v. Gilbert*, 1 Bro. C. C. 542 (u); *Heathe v. Heath*, 2 Atk. 121]; and it will make no difference if the bequest be to children of a person living or a person dead, or to children "begotten or to be begotten," or "born and to be born"; so that, words of futurity (as "to be born") will not prevent the application of the rule [*Sprackling v. Ranier*, 1 Dick. 244] (2). See illustration (g).

§ 8. **Immediate and postpond bequest.**—A bequest or gift is immediate when it is directly made, no previous estate being given, so as to take effect *in possession* immediately on the testator's death (3). In other words, a gift is said to be immediate "when the period of distribution is the date of the instrument coming into operation," and the date of the instrument coming into operation, is, where such instrument is will, the time of the testator's death [See *Singleton v. Gilbert*, 1 Cox. 68; *In re Knapp's settlement: Knapp v. Vassall*, (1895) L. R. 1 Ch. 91, at 96] (4). If, however, the period of distribution is a date subsequent to the instrument coming into operation, the gift or bequest is said to be postponed.

§ 9. **Period of distribution.**—In a gift to a class, the time when the gift is to take effect in enjoyment is called the period of distribution (5), and in ascertaining such period "the period at which the fund has to be distributed is the time that actually has to be taken" (per North, J., in *In re Knapp's settlement; Knapp v. Vassall* [*supra*]). See *supra*, Sec. 77 (S), § 9, p. 265.

(1) Hawk. 69, 70, 72; Interpretation of deeds. 355-56.

(2) Hawk. 68, 69, 70; 1 Jarm. 341, 4th Edn.; 2 Jarm. 155, 156, 4th Edn.; Wms. 1094; Bigelow. 284.

(3) 2 Jarm. 155, 4th Edn.

(4) Underhill. 78; Hawk. 75.

(5) Underhill and Strah. 78.

THE HINDU WILLS ACT.

[PART XII, ACT X, 1865].

OF VOID BEQUESTS.

INTRODUCTORY NOTES.

“To say that the power of alienation is useful, is also to say that all arrangements which tend to prevent it, are generally pernicious” (1). These words involve a noble principle of public policy in pursuance of which, although it is not permissible to deprive property of alienability, which is its most important legal incident, yet gifts made for, or tending to the furtherance of, certain specified objects or purposes, are regarded as absolutely void. Sections 99 (S), 100 (S), 101 (S) 102 (S) and 103 (S), treat of these objects or purposes.

Regard being had, therefore, to the fact, that the tying up the property for an indefinite period, has a tendency to prevent its circulation and paralyse trade, and therefore come within the operation of the above principle, the object of the above mentioned sections is, to draw a line between conditions in restraint of alienation which are valid and those which are void, and thus to fix a period within which Hindus may be allowed to create perpetuities or tie up their properties. So that, “Although the owner of property cannot permanently sever from it the essential incidents or qualities which the law attaches to it, any more than he can inseparably or permanently attach to it incidents which the law does not allow—such as a new course of descent—yet, as he may, in the case of its devolution, substitute within certain limits allowed by law a new course of descent, so he may within certain allowed limits exclude its incidents, such as alienability” (2).

The Select Committee to whom the Bill for this Act had been referred, observed: “A series of recent decisions by the Calcutta High Court has established the proposition that Hindus are incapable of creating perpetuities. But the Courts have not fixed the length of time for which a Hindu may tie up his estate. We think that the Legislature may with advantage supply the needed rule, and have accordingly extended section 101 of the Succession Act and the two preceding and the two following sections. The effect will be to render it impossible for a Hindu to delay the vesting of property beyond the lifetime of a person living at the testator's decease and the minority (18 years) of some person in existence at the expiration of the period. The extension will also preclude questions as to a Hindu's power to bequeath to a person not in existence at the testator's death” (3). The Law Commissioners appointed

(1) Bentham. 174.

(2) Phills. and Trev. 51; see sec. 101 (s) *post*.

(3) Gazette of India, 1870, 29th January, Part V., p. 11.

Law Commissioners' Report.

to draw up the Indian Succession Act and other Acts, said: "We have restricted the power of creating successive interests in property by will by providing that interests so created shall not extend beyond the lifetime of persons living at the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attain the age of 18, the thing bequeathed is to belong [sec. 101 (S)]. We have provided that a bequest to a person not born at the testator's death must comprise the whole of the interest of the testator in the thing bequeathed [sec. 100 (S)]; and that where at the time fixed for the payment of a legacy, the person for whom it was intended has not come into existence, the bequest shall have no effect [sec. 99 (S)]. We have also provided that directions to accumulate the income arising from any property shall be void" (sec. 104, Succession Act) (1).

As regards restrictions which are termed repugnancy, sec. 125 (S), *post*.

42. [99. (S)].—Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Bequest to a person by a particular description, who is not in existence at the testator's death.

Exception. —If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest, or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he be dead, to his representatives.

Compare this *Exception* with that of sec. 98 (S), *supra*. See sec. VI. *ante*.

Illustrations.

(a) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator B has no son. The bequest is void.

(b) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son; afterwards, during the life of B, a son is born to C. Upon B's death, the legacy goes to C's son.

(c) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son; afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(1) Gazette of India, Extraordinary, 1854, 1st July, p. 53.

(d) A bequeaths his estate of Greenacre to B for life, and at his decease to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(e) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator, C has no son, but a son is afterward born to him, during the life of B and is alive at B's death. C's son is entitled to the 1,000.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 6. <i>The rule extended.</i> |
| § 2. <i>Applicability of the section to Hindu wills.</i> | § 6a. <i>Idol not in existence.</i> |
| § 3. <i>Bequest to unborn persons.</i> | § 7. <i>Gift ancillary to gift to an Idol not in existence.</i> |
| § 3a. <i>Further exception to the rule as regards unborn person.</i> | § 8. <i>Rule under English law.</i> |
| § 4. <i>Alangamonjori v. Sonamoni.</i> | § 9. <i>Void and lapsed bequest.</i> |
| § 5. <i>The settled rule.</i> | § 10. <i>Void bequest.</i> |
| | § 11. <i>Use of void bequest.</i> |
| | § 12. <i>The "exception."</i> |

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees. It is omitted in the Oudh Estates Act.

§ 1. **The section.**—This section deals with gifts to persons not in existence at the testator's death, and lays down the broad proposition of law that such gifts are absolutely void. By the exception, however, it is provided that such a gift will be valid under the following circumstances :—

(i) If the legatee or devisee stands in a particular degree of kindred to an individual specified by the testator ; and

(ii) the possession of such legatee or devisee is deferred to a time later than the death of the testator,

(a) by reason of a prior bequest,

(b) or otherwise ;

(iii) and, if under such circumstances the legatee or devisee is alive at the death of the testator, or comes into existence between that event and the time to which his possession is deferred.

The exception further declares that if the legatee or devisee be dead at the time of the deferred possession, the property will go to his representatives.

Thus it is clear that this section, "if it stood alone, would absolutely and without restriction empower a testator to give property to unborn persons standing in any particular degree of kindred, provided those persons come into existence before the gift is to take effect in possession" [Wilson, J. (now Sir Arthur Wilson), in *Alangamonjori Dabee v. Sonamoni Dabee*, (1881, 1882) I. L. R. 8 C., 157, 637 ; 9 C. L. R. 121 ; 10 C. L. R. 459]. But this section does not stand alone : sections 100 (S) and 101 (S), *infra*, embody restrictions upon the power conferred by it. Accordingly, the validity of gifts to persons not in existence at the testator's death is further subject to the restrictions imposed by those two sections (*Ibid.*)

Gifts to unborn persons, therefore, are not absolutely prohibited; what this section absolutely prohibits is, gifts to unborn persons *directly*,—not through the medium of a prior gift or deferred possession. In other words, a Hindu may make a testamentary gift to an unborn person subject to the conditions noted above. See *infra*.

§ 2. Applicability of the section to Hindu wills.—At one time it was thought that this section and some other sections [100 (S), 101 (S) and 102 (S)] were wholly inoperative in cases of Hindu Wills. [See *Alangamonjori v. Sonamoni*, *supra*; *Cally Nath Naug v. Chunder Nath Naug*, (1882) 8 C., 378; *Rai Bishen Chand v. Asmaida Koer* (1884) 11 I. A. 164; 6 A., 560]. But in *Ram Lal Sett v. Kanai Lal Sett* [(1886), 12 C., 663], Mr. Justice Wilson (now Sir Arthur Wilson) pointed out that it would be applicable only in so far as it did not contravene any rule of Hindu law. And now it has been held, that a bequest made by a father to the would-be wife of his son is a bequest to a person described as standing in a particular degree of kindred to the son, and such bequest is, therefore, valid under the exception to this section, which accordingly is applicable to cases of Hindu Wills. But inasmuch as, the exception enlarges the testamentary power of a Hindu, whereas the rule in the section restricts it, it is reasonable to suppose that the Legislature did not intend to apply one portion of the section to the Hindus excluding the other; in other words, if this section is applicable at all to the case of a Hindu Will, both the rule and the exception are applicable [*Dines Chandra Roy Chowdhry v. Biraj Kamini Dasi*, (1911) 14 C. L. J. 20; 15 C. W. N. 945].

But the case of *Dines Chandra Roy Chowdhry v. Biraj Kamini Dasi* (*supra*), was not decided on the basis of the exception alone within the operation of which it was held to have fallen. The bequest in that case was held to be valid mainly on the strength of the principles of Hindu law as explained in *Nafar Chandra Kundu v. Ratnamala Debi*, [(1910) 13 C. L. J. 85; 15 C. W. N. 66]. The material question in both these cases was the same, namely, whether a bequest to the wife of a person, such wife being born during the lifetime of the testator, but married after his death, was valid.

§ 3. Bequest to unborn persons.—There is nothing like an estate *in nubibus* (remaining in abeyance) under the Hindu law. [See *Bramamoyi Dasi v. Jages Chandra Dutt*, 8 B. L. R. A. C. 400, at 407; *Tagore v. Tagore*, 4 B. L. R. A. C. 103; *Gordhandas v. Bai Ramcooverbai*, I. L. R. 26 B., 449; 3 Bom. L. R. 857; *Rai Kisori Dasi v. Debendra Nath*, I. L. R. 15 C., 409; *Cally Dass Dass v. Krishna Chandra Dass*, 11 W. R. O. C. J. A. 11]. The object of that law is, that the property of a deceased person may be immediately made available for his and his ancestors' spiritual benefit. The principle of that law seems, therefore, "to require that property which passes out of one man must immediately vest in another." Hence it is an established rule of that law, that "a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or *in contemplation of law*, be in existence at the death of the testator" (a) [*Tagore v. Tagore*, 9 B. L. R. 377; 18 W. R. 359].

(a) It may be remembered that this act (the Hindu Wills Act) was passed before *Tagore v. Tagore* had been decided in England and this principle of Hindu law was finally laid down by the Privy Council. During the pendency of that memorable case in the Privy Council, the true limits of the rules of Hindu law on the subject were matters of serious controversy; and therefore, stands to reason, that the Legislature would, in enacting the Hindu Wills Act, amend the Hindu law where it was, rather than interfere with any portion of it. From

In enunciating this proposition of law their Lordships of the Judicial Committee said (in *Tagore v. Tagore*): "By a rule now generally adopted in jurisprudence, this class (*i. e.* persons in existence) would include children in embryo, who afterwards come into separate existence," the

Exception.

maxim being, *Nasciturus pro jam nato habetur*. And by a fiction of law, adopted children are also regarded as persons in existence at the testator's death, although such children may actually come into existence long after that event. Their Lordships added: "Such child (*i. e.*, adopted child) may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him (*Ibid*).

Thus by their own law, as thus interpreted, Hindus are prohibited from exercising any power calculated to tie up their property for the benefit of *unborn persons*, to the exclusion of those who have the highest and most natural claim [Scott, J. in *Abdul Cadur-Haji Mahomed v. Turner*, I. L. R. 9 B. 158, at 164].

There is another exception to the rule, and it may be stated thus: Where a bequest is made to any child or other lineal descendant of the testator, and the legatee dies in his (testator's) lifetime, leaving a lineal descendant of his surviving the testator, the bequest shall take effect as if the

Another exception. death of the legatee had happened immediately after the death of the testator [sec. 96 (S), *supra*]. Where, for

instance, a testator gave a legacy to his son's daughter, J., who died during the lifetime of the testator, but left an only child B. who survived the testator, it was held that J. was, in the contemplation of law, as provided in section 96 (S), a person in existence at the time of the testator's death [*Jitu Lal Mahata v. Bindu Bibi*, (1889) I. L. R. 16 C., 549].

It is, therefore, clear that the word 'law' in the expression "in contemplation of law," does not refer to Hindu law only (*Ibid*).

§ 3a. Further exception to the rule as regards unborn person.—

Where a testatrix made a will providing that her eldest son D. should hold her properties for ten years after her death (as executor) and directing him to effect the marriage of her third son, S., within the said period, whereupon those properties were to vest absolutely in the wife of S., it was held that the gift to S.'s wife, who was admittedly married after the death of the testatrix, but born during her lifetime, was valid. In other words, it was not a gift to an unborn person. In support of this view Mr. Justice Mookerjee referred to the following passage from their Lordships' judgment in *Tagore v. Tagore* (*supra*) indicating an exception other than that in favour of adopted children:—"Their Lordships adopting and acting upon the clear general principle of Hindu law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriages or other family provisions for which authority* may be found in Hindu law."

this point of view, in *Dines Chandra v. Biraj Kamini* (*supra*) Mr. Justice Mookerjee in giving effect to the arguments on behalf of the respondents, expressed himself in favour of the view that in enacting section III of this Act, the true intention of the Legislature was "to leave matters where they were."

* Such authority is furnished by the text of Vyasa with comments thereon by Jagan-nath in his Digest. Vide Colebrook, Book II, Chap. IV, Sec. 2, para. 30. referred to by Mr. Justice Mookerjee in his judgment at p. 89.

[*Nafar Chandra Kundu v. Ratnamala Debi* (1910) 15 C. W. N. 66; 13 C. L. J. 85; followed in *Dines Chandra Ray Chowdhry v. Biraj Kamini Dasi* (1911) 14 C. L. J. 20]. See *supra*, sec. 63 (S) § 7, p. 219 and sec. 77 (S) § 8, p. 264—265.

A similar case is *Yethirajulu Naidu v. Mukunthu Naidu* [(1905) I. L. R. 28 M., 363; 15 M. L. J. 299]. In that case, a grandson by adoption who had been born during the lifetime of the testator but adopted after his death was held to be entitled to an equal share with two other grandsons of the testator who were in existence at the time of his death. The facts are these: The testator declared by his will, "My executors shall divide and give away these properties to my own grandsons, being my sons' sons, according to their respective shares." He died leaving three sons, Y., M., & P., and two grandsons by M. and P. Some years after his death Y. adopted a son who had been born in the testator's lifetime, but P. and his son, B., died in the meantime, B. leaving a widow. When this dispute arose there were left, so far as grandsons were concerned, one grandson by M., *i.e.*, son's son, one son's adopted son, or adopted grandson, and one grandson's widow. The suit was for the declaration of the rights of the grandsons, and the only question was whether the adopted son of Y. became, on his adoption, entitled to an equal share with the other grandsons. It was held by Sir S. Subrahmanya Ayyar, J. on the authority of *Motivahoo v. Mamubai* [(1897) L. R. 24 I. A. 937; 21 B., 709], that the doctrine of power of appointment applied, and that the grandson in question was so entitled.

It may be noted that, the doctrine of power of appointment was also applied by Mr. Justice Mookerjee in *Nafar Chandra Kundu v. Ratnamala Debi* (*supra*), his Lordship observing (after stating the fact that if S. had been married in the lifetime of the testator the bequest would have been good)—"The only difference which the will made in substance was that D. was authorised to effectuate the intention of the testator, and the estate vested in the defendant as soon she was married, although it could not vest in her so long as she was a *persona incerta*," (a).

In *Yethirajulu Naidu v. Mukunthu Naidu* (*supra*), his Lordship, Sir S. Subrahmanya Ayyar made similar observations in support of his view. Referring to the fact that the Privy Council applied the doctrine to the case of Hindu wills on the analogy of the power to adopt that may be given by a husband to his widow, and that gifts made under a power to appoint will be valid so far as they may be made to persons in existence of the death at the testator, his Lordship said: "Just as in that case the gift takes effect on the appointment being made, so in the present case the gift takes effect on the adoption being made, * *

§ 4. **Alangamonjori v. Sonamoni.**—In this case the question was directly raised—did the Legislature intend, by extending the "Exception" to the case of Hindu wills executed after this Act came into operation, to confer upon Hindu testators the power of bequeathing property and tying it up to, and for the benefit of unborn persons? And it was answered in the negative, it being held that, by reason of the saving clause in this Act, the whole

(a) With profound respect for the opinions of the learned judges, it is submitted that in applying the doctrine of power of appointment to the above mentioned cases, they have applied the analogy, on the basis of which it is applicable to Hindus, too far.

of section 99, except, the first, and sections 100 & 101 of the Indian Succession Act, though embodied in this Act have no application to Hindu wills. In *Ram Lall Sett v. Kanai Lal Sett* [I. L. R. 10 C. 1663, at 669], a similar decision was arrived at; and Mr. Justice Wilson (now Sir Arthur Wilson) added—"and it would seem to follow that section 102 has none either." [See *Rai Bishen Chand v. Asmaida Koer* (1884) I. L. R. 6 A., 560; I. L. R. 11 I. A. 164]. But see *supra*, pp. 7-8, § 7, "Interpretation of the Act."

As seen above, the view expressed in *Alangamonjori v. Sonamony* (*supra*) has not been followed in *Dines Chandra v. Biraj Kamini*, according to which the exception to the rule under this section is applicable to Hindu wills.

§ 5. The settled rule.—The law is now settled that, subject to the above mentioned exceptions (§§ 3 & 3a *supra*) gifts by will to persons not in existence at the testator's death, whether made prior or subsequent to the passing of this Act are void [see *Tagore v. Tagore*, *supra*; *Kristoromoni Dasi v. Narendra Krishna Bahadur*, I. L. R. 16 C., 383; I. L. R. 16 I. A. 29; *Rai Bishen Chand v. Asmaida Koer*, *supra*; *Hurdey Narain Sahu v. Rooder Perakash Misser*, I. L. R. 10 C., 226; I. L. R. 11 I. A. 26; *Alangamonjori Dabee v. Sonamoni Dabee*, *supra*; *Mangaldas Nathubhoy v. Krishnabai*, I. L. R. 6 B., 38; *Javerbai v. Kabbibai*, I. L. R., 15 B., 326; 16 B., 492; *Bai Motivahu v. Bai Mamubai*, I. L. R. 19 B., 647; 21 B., 709; I. L. R. 24 I. A. 93; 1 C. W. N. 366; *Rojomoyee Dassee v. Troyluckho Mohiney Dassee*, I. L. R. 29 C., 260; 6 C. W. N. 267; *Binode Behary Bose v. Nistarini Dasi*, 33 C., 180; I. L. R. 32 I. A. 193; 7 Bom. L. R. 887; 15 M. L. J. 331; 2 C. L. J. 189; 9 C. W. N. 96]. Such a gift is not valid even if it be made by a person empowered by the testator so to do, or what is called under a power of appointment [*Bai Motivahu v. Bai Mamubai*, *supra*; *Upendra Lal Boral v. Hem Chandra Boral*, I. L. R. 25 C., 405; 2 C. W. N. 295]. That is to say, the power of appointment must be exercised in favour of one who is in existence either actually or in contemplation of law, at the testator's death.

§ 6. The rule extended.—The above rule being based upon the general principles of Hindu law, is applicable to Hindus governed by the Mitakshara, as well as to those governed by the Dayabhaga [*Mangaldas Nathubhoy v. Krishnabai*, I. L. R. 6 B. 38]. In short, the rule is applicable to all wills of Hindus, whether such wills are subject to this Act or not [*Alangamonjori Dabee v. Sonamoni Dabee*, I. L. R. 8 C., 637; 10 C. L. R. 459], and to all forms of bequest. It is also applicable in cases of gifts to idols. But see *infra*, sec. 101 (S), § 11a.

That is to say, in order that a gift to an Idol may be valid, the Idol must be in existence at the time of the testator's death [*Upendra Lal Boral v. Hem Chandra Boral*, *supra*; *Rojomoyee Dassee v. Troyluckho Mohiney Dassee*, *supra*; *Nogendra Nandini Dassi v. Benoy Krishna Deb*, I. L. R. 30 C., 521; 1 C. W. N. 121; *Promotha Nath Ray v. Nagendrabala Choudhurani*, 12 C. W. N. 808; 8 C. L. J. 489](a). This is so, because an Idol has no juridical existence unless it has been consecrated by appropriate ceremonies and has thus become spiritualized [*Doorga Proshad Dass v. Sheo Proshad Pandah*, 7 C. L. R. 278]. So it applies whether the bequest is to take effect immediately on the death of the testator, or is to be deferred by a prior estate, or is contingent on the happening

(a) These cases have been overruled by the Full Bench decision in *Bhupati Nath Smrititirtha v. Ram Lall* [(1909) 37 C., 128; 14 C. W. N. 18; 10 C. L. J. 355]. See sec. 101 (S) § 11a.

of some uncertain extent [see *Tarakeswar Roy v. Shoshi Shekhurreswar Roy*, I. L. R. 9 C. 952; I. A. 51; 13 C. L. R. 62; *Krishnaramani Dassee v. Narendrakrishna Bahadur*, *supra*; *Chundi Churn Barua v. Sidheswari Debi*, I. L. R. 16 C. 71; L. R. 15 I. A. 149; *Anandrao Vinayak v. Administrator General of Bombay*, I. L. R. 20 B. 450].

§ 6a. Idol not in existence.—See *infra*, sec. 101 (S) § 11A.

§ 7. Gifts ancillary to gifts to an Idol not in existence.—Gift to an Idol not in existence being void, gifts or dispositions which are only ancillary to such gifts, are *also void*. Thus where a testatrix after giving certain pecuniary legacies, directed that a *Shiva Thakur* be established, and dedicated certain property for the benefit of that Idol; and she further directed that if there be any surplus of the dedicated funds, such money should be accumulated and set apart for the feeding of the poor, it was held, that the institution of the *Thakur* being the essential bequest, the others were merely ancillary to it, and were accordingly void [*Nagendra Nandini Dasi v. Benoy Krishna Deb*, *supra*].

It seems, however, that in gifts for the performance of periodical pujahs, e.g., Durga pujah, Lakshmi pujah, Kali pujah, &c., the above rule does not apply [*Prafulla Chander Mullick v. Jogendra Nath Sreemani*, 9 C. W. N. 528; 1 C. L. J. 605].

§ 8. Rule under the English law.—The rule under the English law in regard to gifts to unborn persons may be stated thus: "But it is now settled contrary to the early authorities, that a devise to an infant *en ventre sa mere* (in the womb); or to a child to be begotten; and even to a child unborn, when it shall attain 21 years of age; is good. So is a gift to a child, to be born and called by a particular name. But in all cases of devises and bequests to unborn children, they must be children of a person *in esse*, or of a child of the testator; or there must be some special limitation to bring the gift within the rule against perpetuities, or the common law learning, which will protect the gift as a remainder" (1). In other words, according to English law, a life interest or an absolute interest, may be conferred on the unborn child of a living person (2).

§ 9. Void and lapsed bequests.—A lapsed legacy (or bequest) is one which the legatee is unable to receive by reason of the failure of the gift caused by the death of the legatee before the testator [sec. 92 (S), *supra*]. This section also virtually provides the same thing. Under section 92 (S), if the legatee is not in existence at the testator's death, the legacy *lapses*, but under this section such legacy is *void*. The distinction between the two is this: A lapsed legacy is good and valid *ab initio*; it is only the death of the legatee in the testator's life-time, that makes it inoperative. But a bequest which is void, is invalid from the beginning, a mere nullity; the non-existence of the legatee at the testator's death having nothing to do with the fact of its being void. Where the bequest is void, the case is as if it were, so far as the invalidity goes, an intestacy (3).

§ 10. Void bequests.—Bequests are also void on "grounds of fraud, coercion and undue influence [sec. 48 (S) *ante*], on grounds of illegality as being in violation of the rule against perpetuity, &c., and also on the ground that the subject or object of the bequest is uncertain [sec. 76 (S)]. See also

sections 113 (S) and 114 (S), *post*, under which bequests are void by reason of their being based upon impossible or illegal condition.

§ 11. Use of void bequest or will.—See sec. 76 (S), § 11.

§ 12. The “exception.”—The word “Kindred” in this exception, so far as it is applicable to Hindus, is not to be understood in the sense in which it is applicable to persons governed by the Indian Succession Act. Therefore, in so far as this section is one appertaining to the Hindu Wills Act, the word **Kindred**, should not be interpreted in the strict sense of the English law as defined in section 20 of Act X, 1865, which is not incorporated into that Act, and should not be limited to blood relations only. And further, it is to be seen that the definition in section 20 being based upon the principles of the English Statute of Distributions (22 & 23, Car. II. C. 10), it cannot be applied in the interpretation of Hindu Wills, which, as held in *Bhyah Ram Singh v. Bhyah Uyor Singh* [(1870) 13 Moo. I. A. 373; 5 B. L. R. 293; 14 W. R. 1 P. C.] has to be interpreted by the Hindu law alone, without any mixture of laws or ideas derived from any foreign source. [*Dinesh Chandra Ray Chowdhury v. Biraj Kamini Dasi* (1911) 15 C. W. 945, 950-951; 14 C. L. J. 20].

43. [100 (S)].—Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Bequest to a person not in existence at the testator's death, subject to a prior bequest.

See sec. VI, *ante*.

Illustrations.

(a) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(b) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters, some of whom were not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(c) A fund is bequeathed to A for his life, and after his death to his daughters with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life, and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect, in the case of each daughter who marries under eighteen, of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(d) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughter

living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

In *Alangamanjori Dabee v. Sonamoni Dabee* [I. L. R. 8 C., 157, 637; 9 C. L. R., 121; 10 C. L. R. 459] this section [including sec. 101 (S), *infra*, and part of sec. 99 (S), *supra*] has been held to be entirely inoperative in the case of Hindu wills [see the observations of Pontifex, J., in *Cally Nath Naug Chowdhry v. Chunder Nath Naug Chowdhry*, I. L. R. 8 C., 378; 10 C. L. R. 207]. The Privy Council also regret the extension of this section and of sections 101 (S) and 102 (S) to Hindu wills [see *Rai Bishen Chand v. Asmaida Koer* I. L. R. 6 A., 560; L. R. 11 I. A., 164; *Srinivasa v. Dandayudapani*, I. L. R. 12 M., 411]. See sec. 99 (S) § 4 *supra*.

It may be noted that all bequests to persons not in existence at the time of the testator's death being void according to Hindu law, it is immaterial whether such bequests do or do not comprise the whole of the remaining interest of the testator in the thing bequeathed. See *infra*, sec. 103 (S), § 1. This section corresponds to sec. 13 of the Transfer of Property Act, which runs as follows:—

"Where on a transfer of property an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."

This section has been omitted in the Oudh Estates act.

44. [101 (S)].—No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

See sec. VI, *ante*.

Illustrations.

(a) A fund is bequeathed to A for his life, and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the life-time of A and B, and the minority of the sons of B. The bequest after B's death is void.

(b) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime

of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(c) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(d) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 13. <i>Certain specific charities, validity of.</i> |
| § 2. <i>Perpetuity.</i> | § 14. <i>Property partially subject to religious trust.</i> |
| § 3. <i>The rule according to English law.</i> | § 15. <i>Gift to idol and charge for its worship.</i> |
| § 4. <i>Rule under this section.</i> | § 15a. <i>Diversion of dedicated property.</i> |
| § 5. <i>Remoteness.</i> | § 16. <i>Construction of charitable bequests.</i> |
| § 6. <i>Remoteness,—possible events to be considered in.</i> | § 17. <i>Cy-pres doctrine.</i> |
| § 7. <i>"Lifetime of one or more persons."</i> | § 18. <i>Irrevocability of trusts for religious or charitable purposes.</i> |
| § 8. <i>The general rule.</i> | § 19. <i>Superstitious uses.</i> |
| § 9. <i>"Estate—tail."</i> | § 20. <i>Religious and charitable purposes under the "Oudh Estates Act."</i> |
| § 10. <i>Where perpetuities allowable.</i> | § 21. <i>Suit to enforce religious or charitable trusts created by will.</i> |
| § 11. <i>Gift to idol.</i> | |
| § 11a. <i>Idol not in existence.</i> | |
| § 12. <i>Gift to idol and gift to dharma only.</i> | |

Extent of the section.

This section corresponds to sec. 12 of the Oudh Estates Act which reproduces, in a condensed form, his and sec. 14 of the Transfer of Property Act. It is applicable to the Hindus, Jains, &c, and to the Parsees.

§ 1. **The section.**—This section may be compared with section 14 (a) of the Transfer of Property Act, 1882, and section 12 (b) of the Oudh Estates Act of 1869. It has been held to be inoperative in cases of Hindu wills. See sections 99 (S) & 100 (S), *supra*.

(a) Section 14 of the Transfer of Property Act enacts that "no transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

(b) Section 12 of the Oudh Estates Act enacts that "no transfer or bequest under this Act shall be valid whereby the vesting of the thing transferred or bequeathed may be delayed beyond the life-time of one or more persons living at the decease of the transferor or testator and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing transferred or bequeathed is to belong."

§ 2. Perpetuity.—According to its natural meaning, a gift in *perpetuity* is the creation of an interest in property by the terms of which the testator is empowered “to prescribe the course in which such property should devolve and prevent its effectual alienation for any period of time however extended” (1). In other words, a gift in perpetuity is an interest which is inalienable by the legatee or devisee. Thus, a perpetuity is a thing “odious in law, and destructive to the commonwealth,” “on account of its tendency to paralyse trade by shackling property and preventing its free circulation for the purposes of commerce; for it consists in the free application of labour to the free circulation of property, and any restraint laid upon the one would be as injurious to its interests as if imposed upon the other.” [See *Duke of Norfolk v. Howard*, 1 Vern. 160]. Hence the saying is,—“the law abhors a perpetuity as Nature abhors a vacuum” (2).

By a “perpetuity,” in its strict legal and technical sense, is meant “a grant or other limitation whereby the vesting of a contingent estate or interest is, or may be, postponed for a longer period than the law permits.” To prevent the inconveniences arising from excessive restraints upon alienation, the law has fixed a period within which every estate or interest, created by will or otherwise, and which is not, from the time of its creation, a vested interest, must necessarily become a vested interest (3). The rule against perpetuities is, therefore, in its widest form, a rule which imposes a kind of restraint on the power of a testator (or donor), preventing him from postponing the vesting of an interest beyond such fixed period. This rule is also termed *the doctrine of remoteness*; and from this point of view a “perpetuity” denotes “an interest which will not vest till a remote period” (4).

The object of the rule is to prevent the suspense, beyond a reasonable time, of the absolute ownership of property, and of the power of alienation which is an incident of such ownership (5); or in other words, “to prevent the mischief of making property inalienable.” For, if an unlimited period were allowed for the creation of future estates, “the alienation of lands might be henceforward for ever prevented by the innumerable future estates which the caprice or vanity of some owners would prompt them to create (6) [see *Yeap Cheah Neo v. Ong Cheng Neo*, (1875) L. R. 6. P. C. 381; *Fatma Bibi v. Advocate General of Bombay*, 1 L. R. 6 B., 42; *Limji Nowroji Banaji v. Bapuji Ruttonji Limbu walla*, 1 L. R. 11 B., 441]. The rule is based upon the public policy which favours free alienation.

From the foregoing it will appear that a *perpetuity* may operate either by restraining the power of alienation, or by allowing the creation of remote future interests.

§ 3. The rule according to English law.—The “rule against perpetuities” under the English law may be summed up in these words: “A grant or other limitation of any estate or interest, to take effect in possession or

(1) Steph. 552.

(2) 1 Steph. 552, 553; 1 Sm. L. C. 444; 1 Jarm. 250, 4th Edn.; 213-14, 5th Edn.

(3) Edw. L. of Pro. 324.

(4) Wharton. Art. “Perpetuity”; T. L. Lect. 1898. 25. According to Mr. Jarman this is the modern rule against perpetuities, and, “it was not until 1833 that the terms of the rule were definitely settled, and even at the present day the precise limits of its scope and application are a matter of doubt. Jarman 296, 6th Edn.

(5) Marsden. 2.

(6) See Wms. R. P. 319.

enjoyment at a future time, and which is not, from the time of its creation a vested estate or interest, will be void *ab initio*, if, at the time when the limitation takes effect, there is a possibility that the estate or interest limited will not vest within the period of a life or lives then in being, or within a further period of twenty-one years thereafter" (1). Or, to put the same thing in another form—"A limitation by way of executory devise is void as too remote, if it is not to take effect until after the determination of one or more lives in being and upon the expiration of twenty-one years afterwards, as a term in gross and without reference to the infancy of any person who is to take under such limitation or of any other person, allowance for gestation being made only in those cases where it actually exists" (2). Thus a gift to the first son of A, who shall attain the age of 24 years, A not then having a son of that age, will be void, because it is uncertain whether any son of A, will attain that age within 21 years, after A's death. But if the gift be to such son of A as shall attain the age of 21 years, it will be valid, since in this case, the estate vests at the latest on the expiration of A's life and 21 years thereafter, that is, within the period fixed by the rule and not beyond it. The rule may also be stated thus: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within 21 years, and a fraction after some life in being at the creation of the interest" (3). For the purpose of this rule, a person *en ventre sa mere* is considered as a life in being. Accordingly, the usual period of gestation is to be added to the period allowed by the above rule, provided gestation actually exists (4). If, for instance, the gift be to the first son of A who shall attain 21 years, and if A survive the testator and die leaving a wife *enceinte*, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of 21 years beyond a life in being (the life of A.) and a fraction of a year,—the period of gestation (5).

As to the commencement of the period allowed by the rule it has been established that, such period commences at the time when the limitation of the estate comes into force; that is, the date of the instrument where the gift is *inter vivos*, and that of the testator's death where it is by will [see *Ibbetson v. Ibbetson*, 10 Sim. 575] (6).

§ 4. The rule according to this section.—The rule under this section is somewhat different. The lifetime of one or more persons living at the testator's decease for which the vesting might be postponed, is the same under both the English and the Indian law; but the period beyond that time for which such vesting may also be delayed, is not the same. Under the former, such period is an absolute term of 21 years; under this section it is only the "minority of some person who shall be in existence, &c." Thus a Hindu may (if this section is to be followed) tie up his property by testamentary disposition for one or more lives in existence at the time of his death, *plus* the "minority of some person who shall be &c." (See the section). Any bequest purporting to tie up an estate beyond this period, or which is the same thing, a gift which is not to take effect till after that period, is, therefore, void for being too remote.

(1) 1 Steph. 553; Edw. L. of Pro. 325; Wms. R. P. 52, 53, 320, 322; 1 Jarm. 252, 4th Edn.; Marsden. Chap. I. (2) Theob. 519, 5th Edn.; Haynes' L. C. 201.

(3) Beglow 96.

(4) 1 Jarm. 252, 253, 4th Edn.; 215, 5th Edn.; Hend. 215; *Fearne*. 430; Edw. L. of Pro. 327; Bigelow. 96.

(5) As to the origin and growth of this rule in England, see the excellent treatise on the "Law of Perpetuities in India" (T. L. Lect. 1898), pp. 20-49.

(6) 1 Jarm. 254, 4th Edn.; 216, 5th Edn.; Edw. L. of Pro. 326.

The rule is applicable to immoveable as well as to moveable property [*Cowasji Nowroji Poch Khanawalla v. Rustomji Dossabhoy Setna*, I. L. R., 20 B. 511]. See illustrations.

It may be noted that, as seen above, the rule against perpetuities is not applicable to vested interests, for, when an interest has once vested, it cannot be bad for remoteness [see *In re Turney, Turney v. Turney*, (1899), 2 Ch. 739].

§ 5. Remoteness.—It has been seen, that under English law there is a fixed period of time within which a disposition of property is required to take effect, in order that it may be valid. In other words, the vesting of property cannot be postponed beyond a certain fixed period (1); so that, any bequest which purports to create an interest in property which would vest at a time beyond such period, is void. The term 'remoteness' is used in reference to this period.

The analogous rule under Hindu law is to the effect that, no one who is not in existence at the time of the testator's death, is capable of taking a gift; so that, a person to be born after the testator's death, is an object too remote, that is, an object to whom the testator cannot lawfully make a bequest. Thus a gift for the benefit of unborn persons, and a gift to a class which might include persons not in existence at the testator's death, are void for being too remote. [see *Soudaminy Dassee v. Joges Chandra Dutt*, (1877) I. L. R., 2 C., 262; *Kherodemoney Dossee v. Doorgamoney Dossee*, (1878) I. L. R., 4 C. 455; 3 C. L. R., 315; 2 C. L. R. 112; *Jairam Narronji v. Kuverbai*, (1885) I. L. R., 9 B. 491]. See sec. 102 (S) *infra*.

Mr. Phillips and Mr. Justice Trevelyan seem to be of opinion that the Hindu rule as to the incapacity of unborn persons to take a gift is not designed to prevent remoteness or uncertainty (2). The identity of the above two rules is, therefore, still a disputed point, the Privy Council having not yet affirmed it. See next para.

A testator directed that, whatever company's papers, &c., may be "formed into a family fund in the Government trust fund, my great-grand-sons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu law;" and he then declared,— "God forbid it, but should I have no great-grand-sons in the male line; then my daughter's sons when they come of age shall take the said property from the trust fund, and divide it according to the Hindu *shastras* in vogue." At the time of his death the testator left living, one son's son, three sons, and a daughter and her son, but no great-grand-son. It was held, that the gift to the great-grand-sons was void for remoteness. In delivering the judgment of the Court, Mr. Justice Phear, said: "at the time when the testator died the event of a great-grand-son of the testator attaining majority had not happened and it was a contingency, which either might or might not happen at all, or might happen at a period greatly more remote than the period within which a gift must certainly take effect in order to be valid in law" [*Broja Nath Dey Sirkar v. Anandamoyi Dasi*, (1871) 8 B. L. R. O. C. 208]. In *Bramamoyi Dasi v. Joges Chandra Dutt* [(1871) 8 B. L. R. A. C. 400], the testator made a gift over in these terms: "But if any or either of my said four sons shall die without leaving any male issue, or, if he or they shall die leaving such male issue, and the whole of

(1) As to postponement of vesting, see secs. 106 (S) and 107 (S), *post*.

(2) Phills. & Trev.

such issue shall afterwards die under the age of 21 years and without male issue, in such case the share or shares of my said sons so dying shall * * * go to and belong to the survivors of my said sons * * * for life and their respective male issue absolutely after their death." It was held that the gift over was void, because the event on which it was to take effect might be indefinitely remote. Mr. Justice Norman, observed : " It is clear that the event on which this gift over is to take effect may be very remote. A son might be born to one of the testator's sons 40 years after the death of the testator. The death of such a son's son, at the age of 20 years, might constitute the event upon which, according to the terms of the bequest, the property would go over to the surviving children of the testator for their lives or their issue absolutely. During all that time, *i.e.*, the duration of a life in being at the time of the death of the testator and a period which may extend to 20 years and 11 months afterwards, it would be utterly uncertain who would be the person to take on the happening of the event." [See *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, I. L. R. 24 C. 834 ; L. R. 24 J. A. 76].

Thus a gift over upon an indefinite failure of issue is void [*Lalit Mohun Singh Roy v. Chukkun Lal Roy*, *supra* ; *Soorjeemoney Dasse v. Deno Bundoo Mullick*, 9 Moo. I. A. 123 ; 6 Moo. I. A. 526 ; 14 B. L. R. 159 ; 4 W. R. P. C. 114].

§ 6. **Remoteness, possible events to be considered in.**—In deciding questions of remoteness it is an invariable rule of the English Courts that the validity of a gift is to be tried by possible and not by actual events. That is, the question is not whether the limitation is good in the events which have happened, but whether it was good in its creation. The fact, therefore, that a gift might include objects too remote or incapable of profiting directly by the testator's bounty, is held to be fatal to its validity [*Jee v. Audley*, 1 Cox. 324 ; *Dungannon v. Smith*, 12 Cl. F. 546 ; see also *In re Roberts, Repington v. Roberts*, 50 L. J. Ch. 265] (1). Thus, if the gift be to the first son of A who should take a degree at a university, or marry, or do any other act, the performance of which is not necessarily confined to the minority of the donee, the gift will be void, although the act should eventually be done within the prescribed period. The point is, whether the gift is to necessarily vest within the period allowed by law [see *Jee v. Audley*, *supra*]. So the fact that a woman is passed the age of child-bearing is not to be taken into consideration, for the chance of such a woman bearing children is a possible event for the purpose of determining whether a gift is void for remoteness [*Jee v. Audley*, *supra* ; see *In re Sayer's Trusts*, L. R. 6 Eq. 319 ; *In re Dawson*, 39 Ch. D. 155 ; *In re Eaking* ; *Mitchell v. Loe* (1898) 2 Ch. 567] (2). The same rule, it seems, would apply to any other physical incapacity (3).

This rule has been held to apply to cases of Hindu wills. In *Soudaminy Dasse v. Jages Chandra Dutt* [I. L. R. 2 C., 262], Pontifex, J., after stating the rule as above laid down, expressed himself in these terms : " It seems to me that the rule is in a special manner, applicable to and necessary for the Hindu law of devise ; for I take it to be a fundamental principle of that law that the persons who are to take a testator's estate must be certain and known

The rule applied to Hindu wills.

(1) 1 Jar. 272, 4th Edn. ; 236, 241, 5th Edn. ; Theob. 521, 5th Edn. ; Hend. 215.

(2) 1 Jar. 272-73, 4th Edn. ; Theob. 521, 5th Edn. ; Hend. 215-16.

(3) Mayne H. L. § 379, F. n. (s), 6th Edn. ; Law of Perp. in India (T. L. Lect. 1898) 90-93.

at the time of his death, which would not be the case if capacity to take depended on the contingency whether other persons should not come into existence" [see *Rajmoyee Dassee v. Troyluckho Mohiney Dassee*, 6 C. W. N. 267; I. L. R. 29 C., 206]. Besides, the rule is not a rule of the strict English Common law, but it is a rule which was "established as founded on reason and convenience." [See *Ramgattee Acharjee v. Kisto Soondery Debia*, 20 W. R. 472, where Sir Richard Couch, C. J., held the same view]. In *Ramgattee Acharjee's* case (*supra*), a testator gave his widow permission to adopt a son and made provision for such son entering into possession after her death, giving direction, that if the adopted son died unmarried the estate should pass to his nearest *sapinda gnyati*. It was held that the gift was void because the nearest *sapinda* was a person who might not be in existence at the death of the testator. (a)

§ 7. "Lifetime of one or more persons."—The lives which are the measures of the period allowed by the section are not limited to those of persons taking benefits under the will, but may be taken arbitrarily; and there is no limit to their number [*Cadell v. Palmer*, 1 Cl. F. 372] (1).

Again, it is not necessary that the 21 years (under the English law) should be invariably preceded by "the lifetime of one or more persons," for the purpose of constituting remoteness: and where no lives are taken as part of the period, the other part, that is, the 21 years cannot be exceeded. Accordingly, it has been held that a gift to unborn persons cannot be validly postponed for a gross term exceeding 21 years, although not preceded by a life [*Palmer v. Holford*, 4 Russ. 403] (2).

(a) If it is a fact, as it seems to be, that *Ramgatee Acharjee's* case followed the principle laid down in *Leake v. Robinson* (2 Mer. 363), it may be argued that it proceeded on a wrong principle, because, *Bhagabati Barmanya v. Kali Charan Singh* (1 L. R. 32 C., 902) authoritatively declares that *Leake v. Robinson* (*supra*) does not apply to cases of Hindu Wills.

The same view seems to follow from *Bissesswar Sen v. Bhagabati Sen* (3 Cal. L. J. 606). In that case, the testator provided, that the senior in age among his lineal descendants and heirs was to take charge as *shebait* of the trust property dedicated to the worship of an idol, after due administration of his estate by the executors; and it was contended that, following the doctrine of possible and not actual events as laid down in *Tagore v. Tagore*, the gift was bad as senior in age among the lineal descendants might not be in existence at the death of the testator. It was held that, that doctrine did not apply, and the appointment of *shebait* from among the lineal descendants was valid. This view is supported by *Bhabatarini Debba v. Peary Lall Sanyal* (1 L. R. 24 C., 646) where their Lordships [Banerjee (now Sir Gooroodas Banerjee) and Rampini JJ.] refused to apply the doctrine to the case (at pp. 659-660). In *Ranganadha Mudaliar v. Baghirathi Ammall* (1 L. R. 29 M., 412), the Madras High Court also purports to hold the same view (following *Bhagabati Barmanya v. Kali Charan Singh*, *supra*), although they are of opinion that the doctrine is applicable to dispositions under sections 14 and 15 of the Transfer of Property Act (IV of 1882) which do not apply to Hindu wills nor affect any rule of Hindu Law as held therein.

But the doctrine of possible event has been applied by the Bombay High Court in the very recent case of *Kashinath Shamji v. Chinmaji Sadashiv* (1 L. R. 30 Bom., 477; 8 Bom. L. R. 268). In that case one of the clauses of the will was—"As to my other property * * * I give the same to my younger son, M, for his life * * * and I give the property after his death to his son or to his sons in equal shares should there be any." The testator then declared that if M should leave no son, his wife should adopt a son, and his Mukhtears "shall give the said property to him on his attaining the age of 21 years." Some years after the death of the testator M died without leaving any issue. His wife, P, however adopted R as his son. In a suit for the construction of the will, it was argued on behalf of R that the gift to him was good as an executory bequest though his interest did not come into existence

(1) Marsden 32; Law of Perp. 93-95.

(2) Marsden. 34; 1 Jarm. 253, 4th Edn.; 216, 5th Edn.

§ 8. The general rule.—The general rule is, that all gifts, by will or otherwise, which purport to appropriate property to a certain purpose in perpetuity, or tends to make property inalienable, are void as contrary to public policy, unless the purpose be a charitable one, that is, for objects which are in some way useful or beneficial to the public. And although there is no express rule of Hindu law imposing any such restriction upon the operation of a gift by will (or deed), it must be considered as settled, that perpetuity being contrary to the scope and intention of Hindu law, as a rule of public policy, this rule is as much applicable to transactions among Hindus as it is among Englishmen. [See *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*, 2 B. L. R. O. C. 11; *Krishnaramani Dasi v. Ananda Krishna Bose*, 4 B. L. R., O. C. 231; *Tagore v. Tagore*, 9 B. L. R., 377; 18 W. R., 359; *Promotho Dassee v. Radhika Persaud Dutt*, 14 B. L. R. O. C., 175; *Colgan v. Administrator General, Madras*, I. L. R., 15 M., 424]. Thus where a testator attempted to create a trust for the accumulation for 99 years of the surplus income of the estate of the testator in the purchase of zemindaries &c., from time to time, and empowered his trustees to continue such trust after the expiration of the said 99 years, but no disposition was made of the beneficial interest in the zemindaries so to be purchased, it was held that the trust was void [*Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*, *supra*; *Krishnaramani Dasi v. Ananda Krishna Bose* *supra*; *Promotho Dassee v. Radhika Persaud Dutt*, *supra*; *Kamini Debi v. Asutosh Mukerjee*, I. L. R., 16 C. 103; L. R. 15 I. A. 159]. So where the testator directed that his estate should remain in tact, providing for religious services to be kept up by his family from the profits of the estate, his will being that “his heirs, sons, sons’ sons, great-grandsons, and so on in succession should be entitled to enjoy such profits,” it was held that the gift was void. Here the testator’s object was, in the words of Sir Richard Couch, “to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of it, which would not be allowed by Hindu law” [*Shookmoy Chandra Dass v. Monohari Dassi*, I. L. R. 11 C., 684; 7 C., 269; L. R. 12 I. A., 103; 8 C. L. R. 473. Comp. *Lalit Mohun Singh Roy v. Chakkun Lal Roy*, I. L. R. 24 C., 834; 20 C., 906; L. R. 24 I. A. 76; 1 C. W. N. 387; and *Anandrao Vinayak v. Administrator General of Bombay*, I. L. R. 20 B., 450]. On the same ground, a bequest of ten rupees per month will be void if the testator should direct, “in this manner continue to pay in the legatee’s name so long as he shall be alive; after his death continue to pay the same to his descendants from generation to generation” [*A’rumugam Mudali v. Ammi Ammal*, 1 M. H. C. R. 400].

Similarly, where a testator devised certain lands upon trust to apply the rents and profits thereof in the celebration of certain poojahs and periodical

immediately on the determination of the prior life interest of M. Mr. Justice Scott held the gift to be void under this section, and in the course of his judgment said: “I consider the bequest in favour of a son of M who might be adopted at any time after M’s death by a widow who might not have been living at the testator’s decease, is void under section 101 of the Indian Succession Act. I should be prepared to hold on the authority of *King v. Isaacson* (1 Sm. and G. 371) that the interest of the adopted son would vest in him as a son on adoption notwithstanding the provision that the property should be given to him by the executors on his attaining 21 years, but it is clear that if we regard possibilities the vesting might be delayed beyond the period allowed by section 101 and it is no answer to say that the son adopted was in fact living at the death of the testator.”

worship of family Thakoors and other religious festivals, and in the maintenance out of the surplus, of his five younger sons, their wives, sons, and male descendants, and female descendants until their marriage; it was held that the trusts were void, because the so-called religious trusts were only trusts for the worship of idols, and were *neither gifts to idols nor to charity*, the object of the testator being, as the recital showed, to establish a permanent endowment for his descendants [*Chandramoney Dasee v. Mullick Mullick*, 5 C. L. R. 496; Comp. *Dwarkanath Bysack v. Burroda Persad Bysack*, 1 L. R. 4 C., 443; and *Kamini Debi v. Asutosh Mookerjee*, 1 L. R. 16 C., 103]. But a mere recital showing that the testator contemplated to create a perpetuity, is not sufficient to invalidate the subsequent trusts if they are lawfully valid. Thus where a recital to the effect "I am desirous of so disposing of my estate, both moveable and immovable, as to ensure a perpetual income for the worship of the said family deities, and the maintenance of my heirs," was followed by devises and bequests upon trusts some of which were valid, such as trust for repair of houses, &c., together with directions as to funeral and *sradh* expenses, &c., it was held, that the recital did not invalidate the subsequent trusts and gifts which were good according to law [*Kally Prosanno Mitter v. Gopeenath Kur*, 7 C. L. R. 241].

On the same principle, an agreement between coparceners never to divide certain property is invalid according to Hindu law as tending to create a perpetuity [*Ramlinga Khândpuri v. Virupakshi Khanapuri*, 1 L. R. 7 B., 538; *Baba Krishna Mitter v. Harish Chandra Mitter*, cited in Sir F. Macnaghten's *Considerations on Hindu law*, p. 323; see *Rajender Dutt v. Shamchand Mitter*, 1 L. R. 6 C., 106]. So a direction by the testator that lands devised by him shall be leased for ever at an under-value to a designated person [*Att.-General v. Greenhill*, 33 Beav. 193], and a direction not to raise the rent of lands devised [*Att.-gl. v. Catharine Hall*, Jac. 381, noticed by Norman J. in *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*, 2 B. L. R. O. C. 11], are void (1).

In *Rameswar Prasad Singh v. Lachmi Prasad Singh* [1 L. R. 31 C., 111; 7 C. W. N. 688], the testator, a Hindu governed by the Mitakshara School of Hindu law, made a will (or deed of settlement) with the object of keeping his self-acquired property in tact in perpetuity from generation to generation. He directed the creation of a *guddi* for the carrying out of that object, and after assigning some specific properties for the maintenance of his younger son, Sheoadhin, declared that the rest of his property should be inalienably attached to his *guddi reasut*, he being the first incumbent of the *guddi*, and that after his death his eldest son, Lachmi Prasad, should be installed thereon, and manage the properties which were to descend after the death of Lachmi Prasad to his eldest son and after the death of such eldest son to the eldest son of the said eldest son, and so on, by order of lineal primogeniture. The testator further declared that the *guddinashin* for the time being should be the sole manager and administrator of the said estate, and the junior members of the family were to be maintained by him out of the same. It was held, that the eldest son holding the said estate was not a mere trustee for his family, but that the will conveyed an estate of inheritance to the testator's eldest son in spite of the clauses relating to the perpetuation and inalienability of the said estate [*Shookmoy Chandra Dass v. Monohari Dasi*, 1 L. R. 11 C., 684, distinguished].

(1) See Theob. 402.

§ 9. "Estate-tail."—"Estate tail" is an estate given to a man *and the heirs of his body*. It is derived from Statute *De donis conditionalibus* (1, Edw. I. c. 1,—popularly known as Statute of Westminster 2), and is such as will, if left to itself, descend on the death of the first owner, to all his lineal descendants only,—children, grand-children, &c., so long as his posterity endures, "in a regular order and course of descent from one to another" (1). To create an estate-tail is, therefore, to tie up property for an indefinite period by prescribing the course in which it should devolve. A tenant-in-tail, that is, the owner of an estate-tail, cannot accordingly, alienate it at his pleasure by deed or will (2), and subject it to a course of descent other than what its creation involves, except under certain Acts (3) of Parliament recently passed, which allows estate-tail to be barred (4). In India, therefore, where there are no such Acts, an estate-tail cannot be created, for that would amount to an infringement of the rule against perpetuity, which this section provides. "If estates-tail * * can be created, there are no means by which the entails can be barred; and thus perpetuities might be created and the free sale and disposition of property prevented unless the Legislature should interfere to remedy so great a political evil" [*Tagore v. Tagore*, 9 B. L. R. 377; see *Shookmoy Chandra Das v. Monohari Dass*, I. L. R. 7 C., 269; 11 C., 684; L. R. 12 I. A. 103; 8 C. L. R. 473; *Tarakeswar Roy v. Shashi Shikhhureswar Roy*, I. L. R. 9 C., 952; L. R. 10 I. A. 51; 13 C. L. R. 62; *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, I. L. R. 24 C., 834; 20 C. 906; L. R. 24 I. A. 76; 1 C. W. N. 387].

Estates tail cannot be created by the Hindus on another ground,—because such estates are unknown to Hindu law, being inconsistent with its general principles. So it has been held that a Hindu will cannot institute a course of succession unknown to the Hindu law; so that an estate of inheritance cannot be so created under that law, as to take effect as successive life estates. Or which is the same thing, an estate of inheritance cannot be made to operate as a perpetual series of life estates, each succeeding owner deriving his title not through his predecessor in title, as son through his father, but independently, as the holder of a life estate after the determination of the prior estate for life (a). Thus any provision for perpetual descent or for restraining alienation is void (5).

§ 10. Where perpetuities allowable.—As it has already appeared (6), the rule against perpetuities is subject to an exception in favor of gifts for

(a) An estate of inheritance according to Hindu law descends from father to son in its entirety, not by reason of the father's estate coming to an end, but because of its inheritability by virtue of which the devolution takes place, the son being clothed thereby with the legal personality of his father. To hold, therefore, that an estate of inheritance can be created by a Hindu which should descend in the form of a series of life estates or succession of donees for life, is virtually to hold that he can create an estate-tail. But this is opposed to the general principles of Hindu Law of Inheritance [*Tagore v. Tagore*, *supra*; *Kristaramani Dasi v. Norendra Krishna Bahadur*, I. L. R. 16 C., 383; L. R. 16 I. A. 29; *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*, I. L. R. 23 M., 271; L. R. 27 I. A. 69; 4 C. W. N. 329]. But See *Trimbak Bawa v. Narayan Bawa*, I. L. R. 7 B., 1888.

The rule in *Tagore v. Tagore* (*supra*) applying to hereditary office as well as to immoveable property [*Gnanasambanda Pandara Sannadhi v. Velu Pandaram*, *supra*] no estate-tail can be created by a Hindu with respect to any such office.

(1) Wms. R. P. 36.

(2) Edw. L. of Pro. 60.

(3) The Settled Land Acts, 1882 to 1890.

(4) Wms. R. P. 52, 53.

(5) See Mayne's Hindu law, § 395, 5th Ed.

(6) § 8, *supra*.

purposes useful and beneficial to the public, which in a wide sense are called "charitable uses" (1). As regards charitable purpose, the general principle is that such purpose must be one for the benefit of the public, or a section of the public, and not for the private benefit of the donor or his family or of certain individuals (2) [see *Fatma Bibi v. Advocate General of Bombay*, I. L. R. 6 B. 42; *Limji Nowroji Banaji v. Rapuji Ruttonji Limbawalla*, I. L. R. 11 B., 44r; *Colgan v. Administrator General of Madras*, I. L. R. 15 M., 424; *In re Grace Phoebe Roe*, 6 C. W. N. ccxv].—"Charity" is a general public use [*Jones v. Williams*, Amb. 651] (3); and the word "charitable," in the will of a Hindu, written in English, has been held by the Bombay High Court to be a technical term, and one which "must have its technical meaning under the Statute of Elizabeth (4)" [*University of Bombay v. Municipal Commissioners of Bombay*, I. L. R. 16 B., 217, 226]. So the words "charitable purposes" have acquired a technical meaning in the Presidency of Bombay. (*Ibid*). See *supra*, sec. 76 (S) §§ 7 and 8, pp. 256-257.

'Charity' has not been defined in the Indian Succession Act; and section 105 of that Act, which makes special provision for charitable and religious bequests, has not been extended to the Hindus. But section 17 of the Transfer of Property Act (a) (Act IV of 1882) which is applicable to all alike—to Hindus as well as to Mussulmans and others—renders valid all transfers of property *in perpetuity* "for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind." Regard being had, therefore, to the illustrations appended to that section, these purposes may be held to constitute *charitable and religious purposes* for which Hindus may create perpetuities by testamentary dispositions (b). See section 1, Indian Trusts Act (Act II of 1882). See also *supra*, sec. 76 (S), p. 256.

Generally speaking, it may be laid down as settled, that among Hindus, property both moveable and immovable may be dedicated in perpetuity to charitable and religious purposes by testamentary instruments [See *Ramtonoo Mullick v. Ramgopal Mullick*, 1 Knapp. 245; *Sonatun Bysack v. Juggut Soonderree Dassee*, 8 Moo. I. A. 66; *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*, 2 B. L. R. O. C. 11; *Haji Abdul Rahim v. Haji Hamid Moosa*, 5 Bom. L. R. 1010]; and as such purposes are what conduce to the benefit of the public, or a section of it, it seems to follow that there cannot be any restriction as to the locality or community for whose benefit such disposition may be

(a) Section 17, enacts that the restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

(b) A distinction is made in certain Acts in this country, between charitable and religious purposes (see sec. 92, of Act X 1908, Code of Civil Procedure, with the corresponding sections 539 of the Codes of 1877 and 1882); but there is no such distinction in England where charitable purposes are treated as including religious purposes. It seems, Hindu law also recognises such a distinction (5). In *Gordhan Das v. Chuni Lal* [(1907) 30 A., 111; 5 A. L. J. 23], Sir John Stanley C. J. has drawn a distinction between *dharma* and *punya* [see *supra*, sec. 76 (S), n. (b), p. 258].

(1) Marsden. 295.

(2) See 1 Jarm 208-11, 4th Edn.; 166-169, 5th Edn.; Edw. L. of Pro. 33.

(3) 1 Jarm. 208, 4th Edn.; 166, 5th Edn. (4) 43 Elizabeth, (c. 4.

(5) Law of Religious Endowments by Ganapati Iyer, p. cxl.

made. Thus gifts to charity even in a foreign country may be validly made by a Hindu [see *Mitford v. Reynolds*, 16 Sim. 105; 1 Phill. 185] (1).

§ 11. Gift to idol (a).—The exception noted above is applicable to all gifts for charitable and religious purposes which are of a public nature, both in England and in India. But there are certain dispositions of property in perpetuity which are not allowed by English law but are valid under the Hindu law. These are gifts to idols and other religious objects which have received the sanction of the Courts on account of the fact that the personal law of the Hindus which was preserved to them by the Charters of the High Court and the Regulations, is intimately connected with their religion [see *Colgan v. Administrator General, Madras*, 1. L. R. 15 M., 424]. "Neither the English law which forbids bequests to superstitious uses, nor the rule which prohibits the creation of perpetuities, is applicable to gifts to idols in this country." [Mathusami Ayyar, J., in *Alami v. Komu*, App. Nos. 80 and 105 of 1886, cited in *Colgan v. Administrator Genl. of Madras*, *supra* at 446]. "It being assumed to be a principle of Hindu law that a gift can be made to an idol, which is a *caput mortuum* and incapable of alienating, that principle cannot be broken in upon by engrafting upon it the English law of perpetuities" [*Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*, 2 B. L. R. O. C. 47, per Markby J.; see also *Tagore v. Tagore*, 9 B. L. R. 377; *Krishnamaramoni Dasi v. Ananda Krishna Bose*, 4 B. L. R. O. C. 231; *Rajender Dutt v. Sham Chand Mitter*, 1. L. R. 6 C., 106; *Bhuggobutty Prosonno Sen v. Gooreo Prosonno Sen*, 1. L. R. 25 C., 112]. But if the dedication to any idol or for any religious purpose be colourable and not real, the rule against perpetuities cannot be avoided. [*Promotho Dassee v. Radhika Persaud Dutt*, 14 B. L. R. 174; *Chanaramoney Dassee v. Motilal Mullick*, 5 C. L. R. 496; *Robert Watson & Co. v. Ram Chand Dutt*, 1. L. R. 18 C., 10; L. R. 17 I. A. 110, 116, 117; *Brojchandery Debia v. Luchmee Koonwarree*, 15 B. L. R. 176 (n); 20 W. R. 95; *Ram Chandra Mukerjee v. Ranjit Singh*, 1. L. R. 27 C., 242, 249-50; *Surendra Keshab Roy v. Doorga Sundari Dassee*, 1. L. R. 19 C., 513; L. R. 19 I. A. 108; *Hare Sundar Majumdar v. Basanta Kumar Roy*, 9 C. W. N. 154].

In *Profulla Chandra Mullick v. Jogendra Nath Sreemany* [9 C. W. N. 528; 1 Cal. L. J. 605], it has been held that trusts in perpetuity may be created for the daily worship of family Thakurs as well as for periodical Durga Pujah, Lakshmi Pujah, &c., and for the performance of other religious rites and ceremonies, such

Although in some cases there may be a distinction between the two, in practice, where there is charity there is *dharma* according to Hindu law, unless such charity is for immoral purpose.—A pice given to a blind man is charity as well as *dharma*. It is not possible to separate one from the other.

(a) An idol is a proprietor who never dies, but "labouring under physical disabilities which render it necessary that his interests should be looked after" in perpetuity (2). Thus an idol is a juridical person capable of holding property; but it is only in an ideal sense that property can be said to belong to an idol [*Prasunno Kumari Debby v. Golab Chand Babu*, 14 B. L. R. 450; L. R. 2 I. A. 145; *Yagadindra Nath Ray v. Hemanta Kumari Devi*, 1. L. R. 31 I. A. 203; 6 Bom. L. R. 765; 1 A. L. J. 585; 1. L. R. 38 C., 129; 8 C. W. N. 809; *Manohar Ganesh Yambekar v. Lakhmiram Govindram*, 1. L. R. 12 B., 247, 263-65].

One idol cannot be replaced by another, because the deity resides in the consecrated idol and not in any substituted image [*Doorga Prosad Dass v. Sheo Prosad Pandah*, 7 C. L. R., 278].

As to gifts to an idol not in existence, see *infra*, § 11a. See also *supra* sec. 99 (S).

(1) Story, Eq. Jur. § 1184; Agnew's Trusts (T. L. Lect. 1881) 362.

(2) T. L. Lect. 1892, P. 177.

as annual *Sradh* and so forth, although there is no express gift to any specified idol, or some of the idols are not in existence at the time of the testator's death.

A testator, after providing for certain legacies dedicated "all his other estates" to his ancestral deity, *Salagram Sila*, and then made provisions apparently inconsistent with an absolute dedication to the idol, *vis.*, provision for the maintenance of his wife and other relations, provision for the marriage of his daughters, their residence and maintenance, &c., and finally declared that the estate would remain vested in the family idol and that no one should be heir thereto, nor any should have any right to dispose of any property for his own debt. In a suit for the construction of the will, it being contended that the disposition in favour of the idol did not constitute an absolute gift but created merely a charge for religious purposes, it was held, that there was an absolute gift of the entire estate to the idol [*Srinibash Dass v. Monmohini Dasi*, 3 Cal. L. J. 224; *Akhil Chandra Sen v. Rebati Raman Majumdar* (1911) 14 C. L. J. 618].

§ 11a. **Gift to idol not in existence.**—It was held in several cases that a Hindu deity was a juridical person for all purposes and stood on precisely the same footing as an ordinary sentient being; and that, accordingly, a gift to such a deity represented by Hindu idol, was void where that idol was to be established and consecrated after the testator's death. [See sec. 99 (S), *supra*; *Upendra Lal Baral v. Hem Ch. Baral*, 25 C., 405; *Rajomoyee Dassee v. Troylukho Mohinee Dassee*, 29 C., 261; *Nagendra Nandini Dassee v. Benoy Krishna Deb*, 30 C., 521; *Promatha Nath Ray v. Nagendra Balla Chowdhurani*, 12 C. W. N., 808; 3 C. L. J. 489]. But these cases have been overruled, so far as they uphold this view, and it has been held by a Calcutta Full Bench, that the principle which invalidates a gift other than to a sentient being capable of accepting it, and on the basis of which the above view was expressed, does not apply where the bequest is to trustees for the establishment of an image and the worship of such image or idol, after the testator's death. Such a bequest is, therefore, valid under Hindu law. In the Full Bench case the disposition was to this effect—"They shall spend the surplus income which may be left in the *sheba* and worship of *Kalee* after the name of my mother * * *. The image of the deity shall be established and consecrated at my dwelling house or at *Kashee* * * *." This is not a simple gift to an idol to be established after the testator's death. But it is a disposition or trust for religious purpose, and "Here" as Sir L. Jenkins, C. J., said, "the pious purpose is still the legatee and the establishment of the image is merely the mode in which the pious purpose is to be effected," citing *Ramtonoo Mullick v. Ramgopaul Mullick*, (1829) 1 Knap. p. 245 [*Bhupati Nath Smrititirtha v. Ram Lal Maitra*, (1909) 10 C. L. J. 355; 14 C. W. N. 1; I. L. R. 37, 128; see *Gokul Nath v. Issor Lochan* (1886) I. L. R. 14 C., 221; *Bhugabutti Prasanna v. Gooroo Prosonna* (1897) *supra*; *Asutosh v. Doorga Charan* (1879) I. L. R. 5 C., 438; L. R. 6, I. A. 182; 5 C. L. R. 296; *Hemangini v. Nobin Chand* (1882) I. L. R. 8 C., 788; *Parbati v. Ram Barun* (1904) I. L. R. 31 C., 895; 8 C. W. N. 653; *Joiram v. Kuverbai* (1885) I. L. R. 9 B., 491; *Monohar v. Lakhmiram* (1887) I. L. R. 12 B., 267, *affd.* in app. in *Chotalal v. Monohar* (1899) I. L. R. 24 B., 50; 4 C. W. N. 23; I. A. R. 26 I. A. 199].

So, it has been held by the Allahabad High Court that a bequest for completing and building a temple, and for subsequent installation and maintenance of an idol, is valid [*Mohor Singh v. Het Singh* (1910) 32 A., 337; 7 A. L. J. 296; *Chatarbhuji v. Chatarjit* (1911) 33 A., 253; 8 A. L. J. 34]. But in

Chundan Lall v. Arya Pratinidhi Sabha [(1911) 33 A., 793; 8 A. L. J. 944] the same Court held, that where the deity is not named in the deed of endowment, as where the dedication is to *Sree Thakurjee* only, the dedication is not complete and the gift fails on ground of uncertainty.

§ 12. **Gift to idol and gift to dharma only.**—Although the Hindu law makes no distinction between a religious endowment having for its object the worship of a family idol, and one which is for the benefit of the general public [*Rupa Jagshet v. Krishnaji Govind*, I. L. R. 9 B., 169], it seems there is a distinction between a gift to an idol and a gift for religious purposes or 'dharma' only. The former having nothing to do with 'charity' properly so called, stands on a different footing as indicated above; but the latter, it seems, cannot be valid unless the purpose amounts to such charity [See *Gangbai v. Thava Mulla*, 1 B. H. C. R., 71; *Lakshmi Sanker v. Vajinath*, I. L. R. 6 B., 24; *Cursandas Govindji v. Vundravandas Purshotam*, I. L. R. 14 B., 482; 21 B., 646; s. c. under the title of *Runchordas Vandravandas v. Parvatibai*, I. L. R. 23 B., 725; I. R. 26 I. A. 71; 3 C. W. N. 621].

§ 13. **Certain specific charities, validity of.**—But gifts for certain specific and particular charities, such as bequests for the performance of ceremonies and giving feasts to Brahmins, digging wells and so forth, stand on another ground and they are valid [*Lakshmi Shanker v. Vajinath*, *supra*; *Dwarkanath Bysack v. Burroda Persaud Bysack*, I. L. R. 4 C., 443; *Jamnabai v. Khimji Vullubdass*, I. L. R. 14 B., 1; *Morarji Cullianji v. Nenbai*, I. L. R. 17 B., 351; see *Advocate General of Bombay v. Bai Punjabi* I. L. R. 18 B. 551, at 563, 564]. These charities stand on pious purposes enjoined by Hindu religion. The ceremonies are purely religious.

In *Hemangini Dassee v. Nobin Chand Ghose* [I. L. R. 8 C., 788; 11 C. L. R. 370], a gift for the service of an idol, feeding mendicants and travellers, for religious ceremonies; and for repairs in connection with the house in which the idol was kept, and for the distribution of alms and other virtuous acts provided for in the will, was held to be valid. So in *Purnamundass v. Revundass v. Venayekrao Wassoodeo* [I. L. R. 7 B., 19; I. R. 9 I. A. 86; 12 C. L. R. 92], a direction for erecting *dharamsala* for lodging *sadhoos* and saints was held to be good.

In *Jairam Narronji v. Kuverbai* [I. L. R. 9 B., 491], trusts for establishing a temple and for "religious and charitable purposes" were recognized.

But where a will provided that 12 Brahmins should be fed on every *dwadasi* day (12th day of the moon) and one rupee spent for the worship of a goddess in a temple every Friday, and the balance applied for the purpose of distributing *neermaru* (butter-milk) and *tambul* (betel) &c., among people attending a specified festival; and the question turned upon the nature of the gift for the last item, it was held that it was not a religious trust, notwithstanding the provision for the *archana* (worship) of the goddess [*Venkatarama Pillai v. Tulug Board Saidapet* (1911) I. L. R. 34 M., 375; 21 M. L. J. 305]. No question was raised as to whether it was charitable. But it may be submitted that it was neither charitable nor religious.

§ 14. **Property partially subject to religious trust.**—Property may also be devised partially subject to a trust in favour of an idol or for some religious or charitable endowment. Thus where a Hindu lady by will to her sons lands belonging to her to support the daily worship of an idol and to defray

the expenses of certain other religious ceremonies, with a provision that, in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, such surplus should be applied to the support of the family,—it was held, that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might be considerable, and could not be presumed to be valueless [*Ashutosh Dutt v. Doorga Churn Chatterjee*, I. L. R. 5 C., 438; L. R. 6 I. A. 182; 5 C. L. R. 296; see *Sonatun Bysack v. Juggut Soondree Dasse*, 8 Moo. I. A. 66; *Ram Coomar Paul v. Jogender Nath Paul*, I. L. R. 4 C., 56; *Rupa Jagshet v. Krishanji Govind*, I. L. R. 9 B., 169; also see *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen*, I. L. R. 25 C., 112].

§ 15. **Gift to idol and charge for its worship.**—Hence there is a distinction between *gift to an idol and charge for its worship*, which these cases seem to illustrate (1). See *Alamgir Khan v. Kamarunnessa Khanum* [4 C. L. J. 422, at 456] where a dedication of wakf property was held to be intended to create a mere charge to the extent of one fourth of the proceeds of such property, as distinguished from actual dedication to God.—So in *Dassa Ramchandra v. Narasinha* [(1910). 13 Bom. L. R. 101] it was held, that there was no complete dedication to a religious trust, but that the gift was burdened with an obligation to perform certain ceremonies.

§ 15a. **Diversion of dedicated property.**—Where the property dedicated to the worship of an idol is sufficiently large and is considered far more than is required for such worship, it is within the competency of the Court to order a portion of the residue left after the performance of all necessary expenses, to be diverted to other useful charitable purposes [(*Nanu Narayen Kothare v. Advocate Gen. Bombay*, 9 Bom. L. R. 370)].

§ 16. **Construction of charitable bequests.**—It has been decided in England, that in construing a will containing a charitable bequest, when such bequest admits of two constructions, one of which would make it void and the other render it valid, the latter must be adopted [*Bruce v. The Presbytery of Deer*, L. R. 1 Ch. 96]. Where the charity is of great antiquity, contemporaneous usage may be referred to [*Att. General v. Sydney Sussex College*, L. R. 4 Ch. 722] (2).

§ 17. **Cy-pres doctrine.**—Thus, charities being highly favoured in law, they have always received a more liberal construction than the law will allow in gifts to individuals. This, it seems, led to the adoption of the *cy-pres* doctrine, according to which, where from the objects being uncertain, or the bequest being incapable of being carried into exact execution, or for other similar causes, a literal execution becomes inexpedient or impracticable, the Court will execute the will, as nearly as it can, according to the original purposes, or as the technical expression is, *cy-pres*. By virtue of this doctrine the Courts are enabled to carry the intention into effect, as nearly as it possibly be done, without, of course, infringing any rule of law (3). In *The Mayor of Lyons v. The Advocate General of Bengal* [I. L. R. 1 C., 303; L. R. 3 I. A. 32; 26 W. R. 1], their Lordships of the Privy Council say: "The

(1) See T. L. Lect. 1892, p. 180.

(2) Agnew's Trusts (T. L. Lect. 1881). 357.

(3) Story, Eq. Jur. § 1169; 1 Jarvis. 243-44, 4th Edn.

5th Edn.; Wms. R., P. 277.

70; Theob. § 325, 2d Edn.

principle on which the doctrine rests appears to be, that notwithstanding the charity in the character of the substance of the gift, and the particular disposition as to the mode, so that in the eye of the Court the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse.

"In applying the doctrine regard may be had to the other objects of the testator's bounty in constructing a scheme, but primary consideration is to be given to the gift which has failed; and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cy-pres* scheme to benefit that locality." [See *Malchus v. Broughton*, 1 L. R. 13 C., 193; *Longbottom v. Sator*, 1 M. H. C. R. 429]. See also *In re Hormusji Framji Warden*, [1 L. R. 32 B., 214], in which there is an elaborate review of the important English and Indian cases, with comments thereon, by Mr. Justice Davar.

§ 18. Irrevocability of trusts for religious or charitable purposes.—A trust for charitable or religious purposes, when once validly created is wholly irrevocable by the grantor [*Juggut Mohini Dasse v. Sohheemond Dasse*, 14 Moo. I. A. 289]. See *Phundan Lal v. Arya Pratinidhi Sabha* (1914) 8 A. L. J. 944.

§ 19. Superstitious uses.—The English law prohibiting bequests for superstitious uses, has no application in India. Accordingly, gifts for superstitious uses among Hindus have been held to be valid [see *Ramesh Chandra Mullick v. Rajkumari Mullick*, 1 Knapp. 245; *Andrews v. Joakin*, 2 B. L. R. O. C. 148; *Judah v. Judah*, 5 B. L. R. O. C. 433. See also *Advocate-General v. Vishwanath Aiyar*, 1 B. H. C. R. App. ix; *Khusalchand v. Mahadagiri*, 12 B. H. C. R. 214].

§ 20. Religious and charitable purposes under the Oudh Estates Act.—Some restrictions resembling those under the Oudh Estates Act, have been placed on the powers of the Grantees of the Oudh Estates Act for disposing of their property for religious and charitable purposes by gift or will. See sec. 18 and 20, "Oudh Estates Act" of 1869.

§ 21. Suit to enforce purposes of charity.—A trust created by will.—The representatives of a testator who has died intestate, must be

The plaintiff must allege that the trust is for a charitable purpose, and that it is a distinct trust, and not a mere gift. It is not enough to say that the property is for a charitable purpose, and that it is a distinct trust. [See *Brinsford v. Brinsford*, 1 L. R. 58]. "If the plaintiff alleges that the property is for a charitable purpose, and that it is a distinct trust, and that the defendant is the trustee of the property, the plaintiff must also allege that the defendant is the trustee of the property, and that the property is for a charitable purpose, and that it is a distinct trust." [See *Brinsford v. Brinsford*, 1 L. R. 58].

45. [102 (S)].—If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or either of them, such bequest shall be wholly void.

See sec. VI. *ante*.

Illustrations.

(a) A fund is bequeathed to A for his life, and after his death to all his children who shall attain the age of 25. A has some children living at the testator's death. Each child of A living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. "But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A." The bequest, therefore, is inoperative as to any child born after the testator's death. As it is given to all his children as a class, it is not good as to any division of the class, but is wholly void.

(b) A fund is bequeathed to A for his life and after his death to B, C, D, and all other children of A who shall attain the age of 25. B, C, D, are children of A living at the testator's decease. In all other respects the case is the same as that supposed in illustration (a). The mention of B, C and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.

Note.—With regard to this illustration their Lordships of the Privy Council observe: "It may be that illustration (b) to section 102 imports into India an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have (and it seems out of place as attached to a section intended, not to define the word 'class,' but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by sections 100 & 101" [*Rai Bishen Chand v. Asmaida Kuer*, I. L. R. 6 A., 560, at 572, 573; I. L. R. 11 I. A. 164, at 177].

NOTES AND COMMENTARIES.

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| § 1. The section. | § 4. <i>Leake v. Robinson</i> misapplied. |
| § 2. The section explained with reference to the "exception" in section 98 (S), <i>supra</i> . | § 5. The tide turned. |
| § 3. "To a class of persons." | § 6. Primary and secondary intention |
| | § 7. Exception to the rule in <i>Rai Bishen Chand's</i> case. |
| § 8. The conclusion. | |

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees.

§ 1. The Section.—This section is supposed to be based upon *Leake v. Robinson* [(1817) 2 Mer. 363]. In that case the testator bequeathed certain property to W. R. R. for life, and after his decease, to the child or children of the said W. R. R. who, being a son or sons, should attain the age of 25, or being a daughter or daughters, attain that age or be married. *Leake v. Robinson*, with consent, and in case the said W. R. R. should die without leaving issue, at his death, or leaving issue they should all die before any of them should attain 25, if sons, and a daughter,

before they should attain such age, or be married as aforesaid, then to the brothers and sisters of the said W. R. R. on their attaining 25, if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. It appeared that five of the brothers and sisters of W. R. R. were born in the testator's lifetime. This being so, it was contended that though the gift was void as to those born after the testator's death, it was good as to the said brothers and sisters; and in support of such contention it was urged that no case had gone the length of holding that persons who were capable of taking under a will, should not take, merely because they were associated with others who were incapable. Sir W. Grant, M. R., said: "The bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz. bequests of particular legacies to particular individuals; or, what he has as little in his contemplation, distinct bequests, in each instance, to different classes, namely, to grand-children living at his death and to grandchildren born after his death." In the result it was ruled that, "if a bequest is made to a class of persons, in such a manner, that with respect to some of the members of it, it is too remote, by reason of the interest not vesting within the legal limits during which a bequest may take effect, the whole gift fails, notwithstanding, with respect to others of the class, it may not be too remote." Or, as stated by Lord Selborne in *Pearks v. Mosley* [L. R. 5 App. cas., 714], "The rule is that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of the members" (a).

It may be noted, that the rule is applicable even though all the members of the class are in fact born before the bequest takes effect, if it was antiently possible that they might not have been so born, for as already noticed [see sec. 101 (S) *supra*], in determining the validity of a gift, possible and not actual events are to be taken into consideration [*Rajomoyee Dassi v. Trayluckho Mohiny Dassee*, 6 C. W. N. 267, 278; I. L. R. 29 C., 260]. But see *supra*, sec. 101 (S), § 6.

The rule in *Leake v. Robinson* is thus a rule which comes in with reference to the rule guarding against remoteness or perpetuity. The incapacity contemplated by it consisting in the vice of remoteness, it is a mistake to suppose that such incapacity arises from the description of the legatees as constituting a class. As a matter of fact, it is the period of vesting only that produces the incapacity; so that, as described by Wilson, J. (now Sir Arthur, Wilson) the rule "is a rider upon the law of remoteness, and has never been applied to any case except that of a gift to a class tainted with the vice of remoteness" [*Sett v. Sett*, I. L. R. 12 C., 663].

This section, therefore, in so far as it adopts the rule in *Leake v. Robinson*, expressly limits it to the cases of gifts to a class affected by the vices laid

(a) The reason why, a gift to a class is void when it may embrace same objects too remote, is thus stated by Baron Rolfe in *Dunannon v. Smith* [12 Cl. & F. 575]: "there is no intention to give to any number short of the class, and, therefore, if the prescribed limit may be transgressed before the class is filled up, the whole gift fails, because it does not necessarily take effect within the prescribed period" Or, as stated by Sir Lawrence Jenkins, C. J., "the ground would appear to be that it is a gift to the class, not merely to individuals of which it is composed, and so, from inability to ascertain earlier the object of the gift the vesting of that given is delayed beyond the limits prescribed by law" [*Advocate Gen. Bombay v. Karmali Rahimbhai*, I. L. R. 29 B., 133; 6 Bom. L. R. 601].

down in sections 101 (S) & 100 (S). So, their Lordships of the Privy Council say : "Section 102 lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest offends against the rules contained in sections 100 & 101" [*Rai Bishen Chand's case*, I. L. R. 6 A., 560 ; L. R. 11 I. A. 164]. Hence this section is not made applicable beyond the two cases contemplated by sections 100 & 101.

This section corresponds to section 15 of Act IV of 1882 (The Transfer of Property Act.) *

§ 2. **The section explained with reference to the Exception in sec. 98 (S), *supra*.**—It has been seen, that the exception appended to section 98 (S), *supra*, governs those cases of gifts to a class wherein the ascertainment of the class is deferred to a point later than the testator's death. This section also deals with similar cases : for a case coming under its operation must be a gift of which the vesting is deferred [100 (S)] or which is subject to a prior bequest [101 (S)]. The only important point of difference between the operation of the said exception and this section consists in the fact, that in cases under the former no question of remoteness arises, whereas in the latter the question of remoteness is of great importance. If, for instance, a fund is bequeathed to A. for life and after his death to all his children, under the exception to section 98 (S) all the children of A. who may be in existence at his death are entitled to the legacy, and as such the gift vests as soon as A. dies, no question of remoteness can arise. But if the gift be to such children of A. as shall attain the age of 25, a further question arises, whether or not the legacy will vest in all the children within the period allowed by section 101 (S). If the legacy vest in all the children within such period, good ; but if it appear that any one of such children shall attain that age beyond the said period, the vice of remoteness will attach to it and by the operation of this section the whole bequest will be void. Similarly, if after the death of A. the gift be to all his children, with the direction that after the death of the last survivor of such children, the legacy shall pass over to B. ; and if some of the children of A. come into existence after the testator's death, the bequest so far as such last mentioned children are concerned, not comprising the whole interest of the testator (the whole interest being given to B.), is void under section 100 (S) *supra*, and that being so, the whole bequest to the children of A. becomes void under this section. Here also the vice of remoteness attaches to the gift ; for the last survivor of A.'s children may die beyond the period allowed by sec. 101 (S). So the case offends against the rules in both the sections, 100 (S) and 101 (S).

If again, in the case supposed, some of the children of A. be in existence at the testator's death and some are born after that event, the bequest will not be void on account of this inclusion of unborn persons into the class, because it does not offend against the rules contained in sections 100 (S) and 101 (S). See sec. 98 (S) *supra*.

§ 3. **"To a class of persons."**—As to what is a 'class' and what a gift to a class of persons, see *ante* secs. 85 (S) and 98 (S).

Generally speaking, a gift to a class in the sense in which that expression is used in England, must widely differ from a gift to a class in the sense in

* Sec. 15, Transfer of Property Act, runs as follows :—

"If, on a transfer of property, an interest is therein created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class."

which it is understood among the Hindus. In England, there being no joint family system, separateness in food, property and all the details of life, is the ruling idea of its people; so that one brother is no more affected by a gift to another brother than by a gift to a stranger, and there is all the difference in the world between a gift to all the members of a class and a gift to some of them. But with the Hindus, commensality and community of interest are the governing principles of life. Thus for all practical purposes, individuality among the latter is often merged into a class; so that "It may make, and perhaps generally does make, comparatively little difference, whether the title to property is vested in a large or smaller number of the members of the family" [Wilson, J., (now Sir Arthur Wilson), in *Ram Lal Sett v. Kanai Lal Sett*, I. L. R. 12 C., 663]. Besides, in English law "a class means a set of individuals, who are themselves the units of social life. In Hindu Society the family still remains the unit; and it seems to do violence to its fundamental ideas and feelings to say that a gift for the benefit of a Hindu family is bad because a family in the natural course may be expected to expand by the birth of other members. It seems still less justifiable to say that even those who are living cannot take because others may be born into the family" (1). But notwithstanding this difference, if this section is founded upon *Leake v. Robinson*, it will appear to be clear that, in order to justify the application of this section there must be a gift to a class in the sense in which that expression is used in that case. [See *Krishna Nath Nārdyan v. Atmaram Narayan*, I. L. R. 15 B., 543, at 548; *Khimji v. Jairam Narronji v. Morarji Jairam Narronji*, I. L. R. 22 B., 533]. But if *Krishna Nath v. Atmaram* is to be followed, it is doubtful whether a Hindu can make a valid gift to a class as contemplated in this Act.

§ 4. Leake v. Robinson misapplied.—Soon after the Hindu Wills Act came into operation, the rule in *Leake v. Robinson* was first applied, in rapid succession, in the three distinguished cases of *Brammamoyi Dassee v. Jogesh Chandra Dutt** [(1871) 8 B. L. R. 400], *Soudamini Dassee v. Jogesh Chandra Dutt** [(1877) I. L. R. 2 C., 262] and *Aheroaemony Dassee v. Doorgamony Dassee* [(1878) I. L. R. 4 C., 455; 3 C. L. R. 315]. It was then followed by the Bombay High Court in *Jairam Narronji v. Kuverai* [(1885) I. L. R. 9 B., 491]; and again by the Calcutta High Court in *Rojomoyee Dase v. Troylucko Mohney Dasi* [I. L. R. 29 C., 260; 6 C. W. N. 267]. The result was, that a gift whether vested or contingent, to a class which included or might include, persons unborn at the date of the testator's death or the distribution of the gift, was wholly void. The question in those cases did not turn upon the vice of remoteness, or anything affecting the period of vesting, but it turned upon whether the persons constituting the class were all in existence at the death of the testator, or whether any one of them not being then in existence was precluded from receiving the benefit under the will by reason of the Hindu law governing the parties.

It will appear that, in applying *Leake v. Robinson* in the first three of the above mentioned cases (the last two merely followed the first three), their Lordships (Sir R. Garth, C. J., Sir W. Markby, J. and Pontifex, J.) proceeded on the analogy which existed, in their opinion, between "remoteness" and the distance of time from the testator's death beyond which one might be born. As a matter of fact, in overruling the contention to the effect that, there was no reason why, in a gift to a class, those capable of taking should not take, Sir

* These two cases are substantially the same, the parties only being different.

R. Garth, C. J. expressed himself thus : "if we were to hold that the law contended for is applicable in such a case as this [*Kherodemony v. Loorgamony, spura*], it would be applicable also where the class did not consist of sons only, but of grandsons and great grandsons, who might not be born for fifty or a hundred years after the testator's death." Following the analogy, therefore, they purported to declare that a person to be born after the testator's death was an object too remote, and consequently one to whom the testator could not lawfully make a bequest.

Thus the rule in *Leake v. Robinson*, was extended to cases other than those of *Remoteness*, and the result was that, the incapacity of a person arising from remoteness became identical with the incapacity which arises from such person being unborn at the time of the testator's death. In other words, offending against the rule of remoteness came to be regarded as equivalent to offending against the rule of gift to an unborn person ; or which is the same thing, vice of remoteness and vice of non-existence at testator's death, were identical.

§ 5. The tide turned.—But the tide turned, and *Leake v. Robinson* was finally and authoritatively held not to be applicable to

Rai Bishen Chand v. Asmaida Koer. as the decision of the Judicial Committee in *Rai Bishen Chand v. Asmaida Koer* [(1884) L. R. 11 I. A. 164 ; I. L.

R. 6 A., 560] which was pronounced in March 1884, was published in this country. In that case Mata Dyal, the *Kurta* of a Hindu family governed by the Mitakshara, in order to protect the ancestral estate against the profligacy of his son, Udey Narain, with the consent of Udey Narain, to whom Rs. 5000 were paid, transferred the estate to Satrujit Narain (Udey Narain's son) and his brothers who are born or may be born hereafter. The validity of this gift was impeached on the ground that as the unborn sons of Udey Narain could not take, the gift to Satrujit himself as a member of the class of Udey Narain's sons, was void, and in support of this contention this section was referred to. Their Lordships of the Judicial Committee held, that the gift in question did not come within the terms of that section and that it "was not made to a class of whom *Satrujit* was one, but that it was made to *Satrujit* as a person in whose favour it was intended to operate at once, for a purpose which would be absolutely frustrated if it did not so operate." In delivering the judgment of the Court their Lordships observed : "Assuming that the deed is intended to express a gift to the brothers of *Satrujit* which cannot take effect as such, what is the whole scheme of the parties ? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation. The only member of that generation was the grandson *Satrujit*. He, therefore, is made to take by name and immediately, and the possession and ownership are transferred to him. Is then the gift indisputably designed for him wholly to fail because the parties supposed that they could join with him possible after-born sons, who, if any had happened to be born, could not legally claim under a gift ? Is Udey Narain, whose interests were bought out for valuable consideration, to re-enter upon his son, in whose favour they were bought out ? No doubt on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail. The paramount intention was to get rid of Udey Narain by passing the property to his sons. That intention is much more readily effectuated by giving the property to *Satrujit*, the only

then son of Udey Narain, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of Asmaida, did not operate any change at all."

"Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to, part of it rather than hold it shall fail entirely. In the present case, there is every reason for holding that, if Satrujit's possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present, and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described in general terms is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in India. * * * * Their Lordships hold that the circumstances that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact." (a).

This case was followed in *Ram Lal Sett v. Kanai Lal Sett* [(1886) I. L. R. 12 C., 663]. In that case, Radhakrishna Sett executed a deed in January 1871, by which he purported to convey two plots of land to the defendants Ram Lal Sett and Sham Lal Sett, who were two of his grandsons, and to any brothers of those two who might subsequently be born. Possession was taken by the two brothers under the deed, and usual mutation of names effected. Radhakrishna Sett died in February 1875. Upon this, the plaintiffs filed this suit seeking to recover from the defendants the said two plots of land, alleging that the deed of 1871 was an attempted gift to a class, some of whom were incapable of taking, and as such was totally void; and that, the property, therefore, remained in Radhakrishna till his death and passed to his heirs. In the Original Court Mr. Justice Pigot held, on the authority of *Soudaminy Dassee v. Joges Chandra Dutt* [I. L. R. 2 C., 262] and *Kherodemoney Dassee v. Doorgamoney Dassee* [I. L. R. 4 C., 455], that the gift in favour of the defendants was inoperative and void, as being a gift to a class of persons some of whom were not in existence at the time the gift took effect. This decision was reversed on appeal, and their Lordships (Garth, C. J. and Wilson, J.) held, following *Rai Bishen Chand v. Asmaida Koer* [supra], that there was a good gift to the two living grandsons, Ram Lal Sett and

(a) "The true ground of decision in this case appears to be that in construing family settlements of this nature, Courts are to ascertain the real meaning of the parties to the transaction; that when that meaning has been ascertained, if it appears that the whole plan cannot be carried out, but that a part of it can, effect is to be given to that part. And that, accordingly, if the plan be to give a present gift to persons capable of taking, that gift is effectual, although it was also intended that other persons incapable of taking, should afterwards come in and share in the gift." [Wilson, J. (now Sir Arthur) in *Sett v. Sett*].

(b) It is noticeable that the cases of *Rai Bishen Chand* and *Ram Lal Sett* are both cases of gifts *inter vivos*. The reason for treating these cases as applicable to the law of wills is the fact that, "whether a gift be given by act *inter vivos* or by will, no one can take under the gift who is not in existence, and thus capable of taking at the date from which the gift speaks, that is to say, the date of the gift if *inter vivos*, the death of the testator in the case of a will." [Wilson, J., in *Ram Lal Sett v. Kanai Lal Sett*, supra]. Besides, the law of wills in India is a development of the Hindu law of gifts *inter vivos* [Tagore v. Tagore, 9 B. L. R. 377]; and the Legislature have assimilated the law of transfer by act of parties to the law of wills as laid down in this Act.

Sham Lal Sett, and that the plaintiffs were not entitled to recover. In delivering the judgment of the Court Mr. Justice Wilson, (now Sir Arther Wilson) said: "I think he (Radhakrishna Sett) meant to give the two living grandsons a present title to, and the present possession and enjoyment of, the property, but that their title was liable to be partially divested in favour of after-born brothers. This intention seems to me to be sufficiently expressed in the instrument of gift, and in this case, as in that before the Privy Council, the conduct of the parties makes the intention clear." His Lordship pronounced a decisive opinion as to the inapplicability of *Leake v. Robinson* to the wills of Hindus, and concluded by holding "that where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking." [See *Khettermohan Mullick v. Gungaharain Mullick*, 4 C. W. N. 671 (n), where a trust for the education of the testator's grandsons was held to be good so far as those who were born at the time of the testator's death were concerned].

The next case is *Bhabatarini Dehya v. Peary Lall Sanyal* [(1897) I. L. R. 24 C., 646; 1 C. W. N. 578]. In this case Mr. Justice Banerjee (now Sir Gooroodas Bannerjee) and Mr. Justice Rampini, accepted the views expressed in the above mentioned cases, and refused to follow the authority of *Leake v. Robinson*.

The Bombay and Madras High Courts have also taken the same view. See *Krishnanath Narayan v. Atmaram Narayan*, I. L. R. 15 B., 543; *Mangaldas Parmanundas v. Tribhubandas Narsidas*, *Ibid.* 652; *Tribhubandas Ruttonji Modi v. Gungadas Tricumji*, I. L. R. 18 B., 7; *Krishnarao Ram Chandra v. Benabai*, I. L. R. 20 B., 571; *Manjamma v. Padmanabhayya*, I. L. R. 12 M., 393. See also *Gordhan Dass v. Bai Ram Coover*, I. L. R. 26 B., 449; 3 Bom. L. R. 857; *Advocate General, Bombay v. Kormali*, I. L. R. 29 B., 133; *Ranganadha Mudaliar v. Baghirathi Ammal*, I. L. R. 29 M., 412.

The latest case is that of *Bhagabati Barmanya v. Kali Charan Singh* [(1911) I. L. R. 38 C., 468; 8 A. L. J. 433; 15 C. W. N. 393; 13 C. L. J. 434; 13 Bom. L. R. 375. In H. C. (1905) 32 C., 992; 1 C. L. J. 482; 9 C. W. N. 749]. In this case the testator devised his properties to his

Bhagabati Barmanya v. Kali Charan Singh.

mother and wife, creating a joint estate for their lives, and disposed of the remainder in these words: "On the death of my mother and wife, the sons of my sisters, Golap Sundary and Annapurna, that is to say, their sons who are now in existence, as also those who may be hereafter born, shall in equal shares, hold the said properties in possession and enjoyment by right of inheritance". It was held, "There is no rule of Hindu law that a gift *inter vivos* or a bequest to a class of persons, some of whom are incapable of taking by reason of the rule that the gift is valid only if it is made to a sentient being capable of taking, is void also as regards those who are sentient and capable of taking." It was also held that the proposition that a gift must fail in its entirety because effect cannot be given to a part of it, ought not to be applied to documents made by Hindus.

And as regards *Leake v. Robinson*, it was held, that the rule in that case was repugnant to Hindu notions, and "it ought not to be applied to deeds or wills executed by the Hindus."

§ 6. Primary and secondary intention.—There is another ground which may be adduced in support of the rule established in *Rai Bishen Chand*

v. *Asmaida Koer*. Where there is a primary intention and a secondary intention, the Courts are not bound to adopt a construction which would defeat the primary intention of the testator because effect cannot be given to his secondary intention, or would defeat the secondary intention because the primary fails [see *Krishnarao Ram Chandra v. Benabai*, I. L. R. 20 B., 571; *Khimji v. Morarji*, I. L. R. 22 B., 533; *Gordhandas v. Bai Ram Coover*, I. L. R. 26 B., 449, at 469. See also *In re Coleman*, 4 Ch. D. 169, per Jessel, M. R., cited in *Ram Lal Sett v. Kanai Lal Sett*, I. L. R. 12 C., 663]. Thus where the primary intention of the testator is that all the members of the class should take, and his secondary intention that if all cannot take those who can take, shall take; and the Court finds that the primary intention fails; effect should be given to the secondary intention (*Ibid*).

In *In re Coleman (supra)* Sir George Jessel, M. R., speaking of gifts to a class, says: "The testator may be considered to have a primary and a secondary intention. His primary intention is that all the members of the class shall take, and his secondary intention is, that if all cannot take those who can, shall do so." Referring to this passage, in *Sett v. Sett (supra)*, Mr. Justice Wilson (now Sir Arthur Wilson) observed: "I think this applies in all these cases of gifts to family groups; that the governing intention is to provide for the group, and that that intention is best effectuated by vesting the property in those members of the group who are capable of taking it."

So, the doctrine of primary and secondary intention as laid down in the case of *In re Coleman (supra)*, was also applied in *Bhagabati Barmanya's* case, where it was held that, the primary intention of the testator, which was that all his nephews, born and to be born, should take, failing, his secondary intention that those of his nephews who were in existence should take must be given effect to, and the bequest to the nephews who were competent to take, was good.

§ 7. Exception to the rule in Rai Bishen Chand's case.—But where there is no such secondary intention, and the only intention is, that all the members of the class as a whole shall take, this will form an exception to the rule laid down in *Rai Bishen Chand v. Asmaida Koer* and *Ram Lal Sett v. Kanai Lal Sett*. Accordingly, where the testator directed that after the death of the last survivor of his five sons the property should be divided among the sons of his sons and daughters of his sons, and in certain events, among the widows of his sons, and he left five sons, three grand-sons, and three grand-daughters, and after his death two more grand-daughters were born; it was held, that the gifts to the sons, daughters and widows of the deceased sons were void, because they were gifts to a class of which some members were not in existence at the time of the testator's death [*Khimji Jātram Narronji v. Morarji Jairam Narronji*, I. L. R. 22 B., 533; see *Rojomoyee Dassee v. Troyluckho Mohiney Dassee*, 6 C. W. N. 267; I. L. R. 29 C., 260; *Gordhandas v. Bai Ram Coover*, I. L. R. 26 B., 449, at 468].

Similarly, in *Siba Sankara Pillai v. Soobramania Pillai* [(1908) 31 M. 517; 4 M. L. T. 306; 17 C. W. N. 488 P. C.], their Lordships of the Madras High Court refused to adopt a construction on the basis of a supposed secondary intention, as that would be "absolutely inconsistent with the intention of the testator as expressed in the will."

§ 8. The conclusion.—The conclusions deducible from the foregoing cases may be stated in the following words:—

1st—That in a case coming within the operation of this section, the only material question is, whether the gift is to a *class* in the sense in which the word is used in this Act, it being an established rule that if it is a *gift to a class as a whole* it cannot take effect individually.

2nd—That the question whether the gift is to a class or to individuals, depends entirely upon the terms of the will and the testator's intention.

3rd—That where the gift is not to a class as a whole, what ought to guide the Courts is the rule, that when the real intention of the testator has been ascertained, such intention is to be carried out to the extent which the law allows.

4th—That the rule of construction in *Leake v. Robinson*, is not applicable to Hindu wills.

46. [103(S)].—Where a bequest is void by reason of any of the rules contained in the three last preceding sections, any bequest contained in the same Will, and intended to take effect after or upon failure of such prior bequest, is also void.

Bequest to take effect on failure of bequest void under sections 100, 101 or 102.

See Sec. VI *ante*.

Illustrations.

(a) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son, to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A. as shall first attain the age of 25, which bequest is void under section 101. The bequest to B is void.

(b) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, and if no son of A shall attain that age, to B. A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons as shall first attain the age of 25, which bequest is void under section 101. The bequest to B is void.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Illustrative cases.*

§ 3. *Where the limitations are alternative or substitutional.*

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees.

§ 1. The section.—This section seems to be derived from the old doctrine that “there cannot be a possibility upon a possibility in the creation of a contingent remainder (1), and it is in accordance with the rule of English law to the effect that, where a devise is void for remoteness, all limitations ulterior to or expectant upon such devise are also void (2). That is to say, where a prior gift is void, the ulterior gift which is intended to take effect on failure of, or

(1) Edw. L. of Pro. 140.

(2) 1 Jarm. 283, 4th Edn.; 253, 5th Edn.; Theob. 525, 5th Edn.

postponed to such void gift, must also be void, for one is dependent on the other. [See *Tagore v. Tagore*, 9 B. L. R. 377, 410; 18 W. R. 359, 372].

It is to be observed, however, that, inasmuch as the invalidity of the ulterior bequest is dependent upon that of the prior bequest *by reason of any of the rules contained in sections 100 (S), 101 (S) or 102 (S)*, where the prior bequest is void otherwise than by the rules contained in those sections, the ulterior bequest will not be void. Thus it is submitted that, if A. bequeaths to B. for life, and after B.'s death to his son for life, and then to C. in fee; and if B. has no son at the time of the testator's death, the gift to such son being void not by reason of any of the rules contained in those sections but by reason of the rule of Hindu law, the ulterior gift to C. will take effect, although section 100 (S) may be applicable to the case (as a matter of fact the gift to B.'s son is void under that section also). So, where, therefore, the failure of the bequest to the adopted son was due to the fact that the power of adoption given by the will was declared to be invalid according to Hindu Law, it was held, that such failure did not render the subsequent bequest to the daughters of the testator void [*Radha Prasad Mullick v. Rani Moni Dasi*, and *Piary Lall Mullick v. Rani Moni Dasi*, 9 C. W. N. 1033; 3 Cal. L. J. 502; 10 C. W. N. 695; I. L. R. 33 C., 947]. But see sec. 100 (S).

§ 2. Illustrative cases.—Where a bequest was made to A for life and after her death to her children *when they should attain the age of 27 years*, and in the event of her having no children, over; it was held that the gift to the children being void by reason of its being too remote, the gift over which was the ulterior bequest expectant on the failure of such children of A as shall attain the age of 27 years, was also void [*Cambridge v. Rous*, 8 Ves. 12. See *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358; *Beard v. West Cott*, 5 Taunt. 393; *in re Thatcher's Trusts*, 26 Beav. 365] (1).

A testator provided as follows:—"Whatever company's paper, moveable and immoveable property, &c., shall be formed into a family fund in the Government Trust fund, my great-grand sons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu law. God forbid it, but should I have no great-grandsons in the male line, then my daughter's sons when they come of age shall take the said property from the Trust fund, and divide it according to the Hindu Shastras in vogue." The testator left living, at the time of his death, one sons son, three sons, and a daughter and her son, but no great-grandson. It was held that the bequest to the great-grandsons being void for remoteness, the bequest to the daughter's sons which was dependent on (and not alternative to) the gift to such great-grandsons, was also void under this section [*Broja Nath Dey v. Anandmoyi Dasi*, 8 B. L. R. O. C. 208]. See sec. 119 (S), *post*.

§ 3. Where the limitations are alternative or substitutional.—But where the ulterior gift is not intended to follow upon as above, but is intended to be made in substitution for the prior gift, and one of such gifts is too remote and invalid and the other is valid and capable of taking effect, the Court will disregard the invalid one and give effect to that which is legal, if the event on which it is limited occur. Or which is the same thing, if the ulterior gift is to take effect upon either of two contingencies, one of which is within and the other not within the prescribed limits, and the former contingency happens to occur, the ulterior gift will take effect the other contingency being disregarded.

(1) 1 Jarm. 283, 284, 4th Edn.; 253—55, 5th Edn.; Theob. 525, 5th Edn.; Hend. 226.

Thus where A. devises a house to B., in case C. should die without leaving sons, or in case such sons should die without issue, and C. in fact dies without leaving sons, the gift to B. will take effect, although the second contingency offends against the rule in section 101 (S). [*Watson v. Young*, 28 Ch. D. 436; see *Longhead v. Phelps*, 2 W. Bl. 704; *In re Thatcher's Trusts*, 26 Beav. 365; *Money Penny v. Dering*, 2 DeG. M. & G. 145; *Hodgson v. Halford*, 11 Ch. D. 959; see also *Smith v. Bence* (1891) 3 Ch. 342, where *Watson v. Young*, (*supra*) was doubted] (1).

See *Javerbai v. Kablibai*, I. L. R. 16 B., 492, 497, where the gift over was treated as an alternative one and was, therefore, held to be valid.

The principle of the section being of universal application, may be extended to the case of a gift in remainder, expectant on the termination of an estate for life, which was held to be accelerated by reason of the prior life estate not taking effect [see *Adjoodhia Baksh v. Rakhman Kur*, I. L. R. 10 C., 482; I. L. R. 11 I. A. 1.—*Lainson v. Lainson*, 5 DeG. M. & G. 754, followed].

(1) 1 Jarm. 285, 286, 4th Edn.; 255—59, 5th Edn.; Theob. 526, 5th Edn. Hend. 22

The Hindu Wills Act.

[PART XIII, ACT X, 1865].

OF THE VESTING OF LEGACIES.

47. [106 (S)]. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy. And in such cases the legacy is from the testator's death said to be vested in interest.

Date of vesting of legacy when payment or possession is postponed.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

The last clause may be read with sec. 118 (S) *post*.

Illustrations.

(a) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B. and, if he dies before C, his representatives are entitled to the legacy. See sec. 107 (S). § 5 (b).

(b) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

(c) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

Note.—Here the interest given to B is, in fact, a *remainder*,* taking effect on the determination of the prior interest given to A. The interest given to B which becomes vested on the testator's death is termed a *vested remainder*.

* An estate in remainder, or simply a remainder, is an estate in expectancy (a), created by an express grant, by the terms of which it is to become an estate in possession (b) upon

(a) *Estate in Expectancy.*—An estate 'in expectancy' is where a man is entitled to its possession and enjoyment not immediately, but at some future time (1).

(b) *Estate in possession.*—An estate is said to be 'in possession' when the tenant is entitled to the immediate possession and enjoyment of it. Estates in possession are sometimes also called estates *executed* "whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstances or contingency, as in the case of estates *executory*." A man may have an estate in possession, although he may not be in the actual possession, so long as he may enforce his right to possession by legal process (2).

(1) 1 Steph. 309, 310; 2 Black. 139; Edw. L. of Pro. 112.

(2) 1 Steph. ib. Edw. 2 Black. *Ibid*; L. of Pro. 51.

(d) A fund is bequeathed to A until B attains the age of 18, and then to B. The legacy to B is vested in interest from the testator's death.

(e) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

Note.—This is illustrative of the presumption which seems to exist in favour of the vesting of residuary bequests. See § 12 *infra*.

(f) A fund is bequeathed to A, B, and C in equal shares, to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vest in interest in A, B, and C, subject to be divested in case A, B, and C shall all die under 18, and upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives. See *Maseyk v. Fergusson*, 1. L. R. 4 C., 304.

NOTES AND COMMENTARIES.

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| § 1. The section. | (c) In case intermediate interest is given or applied for the benefit of the legatee. |
| § 2. "Vested." | (2) Where a prior interest is created. |
| § 3. Vested interest. | (3) Where the prior interest is followed by gift over. |
| § 4. Contingent interest. | § 9. Effect of gift over upon vesting. |
| § 5. Vested in possession. | § 10. Note. |
| § 6. Vested in interest. | § 11. "Unless a contrary intention appears by the will." |
| § 7. Words necessary for vesting. | § 12. Postponement of vesting under residuary bequest. |
| § 8. Cases where legacy becomes vested in interest and is transmissible. | § 13. Postponement of vesting from other causes. |
| (1) When payment alone is postponed. | § 14. "To be paid" or "payable at." |
| (a) In case gift and direction to pay are distinct. | § 15. Direction to pay. |
| (b) In case the only gift is in the direction to pay. | |

the expiration of the period limited for the duration of an estate immediately preceding it,—both estates being created by the same instrument (1). [See *Blackman v. Fysh*, (1892) 3 Ch. at 220]. "If any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine,—it is then a vested remainder * * *. It would be an estate in possession were it not that other estates, have a prior claim; and their priority alone postpones or perhaps may entirely prevent, possession being taken by the remainder-man. The gift is immediate; but the enjoyment must necessarily depend on the determination of the estates, of those who have a prior right to the possession" (2). Thus, where the person to whom the estate in remainder is limited, is ready to take it the moment the prior estate determines, the remainder is a *vested* one. [*Manmatha Nath Biswas v. Rohillimoni Dasi*, 1. L. R. 27 A., 406]. But if such person is not ready to take as soon as the prior estate determines, the remainder is *contingent*. If, for instance, an estate be granted to A for his life, with remainder to his first son, A having no son at the time of the grant, the remainder is contingent, until A shall have a son born to him. As soon, however, as a son is born to A, the remainder ceases to be contingent, and it becomes a vested one. A *contingent remainder* may therefore, be defined to mean a remainder granted to a person unborn, or unascertained; or it is a remainder granted to a person conditionally upon the happening of an event that may never happen, or may not happen till after the determination of the prior estate (3).

(1) 1 Jarm. 864, 4th Edn.; 1 Steph. 315; 2 Black. 139; Wms. R. P. 244; Edw. L. Pro. 120.
 (2) Wms. R. P. 225; 1 Steph. 322; 2 Black. 143.
 (3) Wms. R. P. 269; Edw. L. of Pro. 131.

. Extent of the Section.

This section is incorporated in the Hindu Wills Act is applicable to the Hindus, Jains, &c.

§ 1. The section.—Legacies are payable under a variety of circumstances according to the directions of the testator. These circumstances are chiefly two: (a) where a legacy is given generally, without specifying the time when it is to be paid; and (b) where a future time for the payment of the legacy is defined by the will. Section 91 (S), *ante*, contemplates the first, and this section deals with the second. The principal question involved in both is, what is the vesting period of the legacy, or when does it become due and when payable? A legacy may be due at one period and payable at another, as for instance, when there is no direction in the will as to the period of vesting, the legacy is due on the day of the testator's death [sec. 91 (S), *supra*], though not payable till the end of a year next after that period (1). See sec. [117 (P) *post*].

It has already appeared that, under section 91 (S), *supra*, the transmissibility of a legacy to the legatee's representatives, depends upon the period of vesting, and such period, when the will is silent as to the time when the legacy is to be paid, is the day of the death of the testator; in other words, the transmissibility of a legacy does not depend upon the period of possession or enjoyment, but is determinable by the period of vesting only. This section, in effect, repeats the same thing, adding, that the same result will follow even if the testator expressly directs that the possession or enjoyment of the thing bequeathed shall be delayed or postponed.

Neither of these sections contemplates any direction in the will as to the period of vesting. From this it is not to be understood that in all cases where payment or possession is postponed, or words of futurity are introduced, the vesting is necessarily to be on the testator's death; for, in such cases, it may be a question whether the future time is intended to be annexed to the time of payment, or to the very gift itself; that is, whether such time is intended to suspend the payment or possession, or to suspend the vesting. It has accordingly been laid down that, "when a future time for the payment of the legacy is defined by the will, the legacy will be vested or contingent, according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it." In other words, if the futurity appears to relate to the time of payment only, the legacy vests immediately, or if it is annexed to the substance of the gift, the very vesting is suspended (2). For instance, a sum of money is bequeathed to a person at the age of 21 years, or at the expiration of a definite period from the death of the testator, the very vesting, and not the payment merely, is deferred; but if the legacy is, in the first instance, given to the legatee, and is then directed to be paid at the age of 21 years, or at the end of ten years after testator's death, the legacy vests immediately.

The question, therefore, under this section, resolves itself into this:—Whether the words of futurity are inserted with the intention of postponing the vesting, or merely to suspend possession or enjoyment of the thing bequeathed. In other words, whether the legacy becomes vested in interest to the legatee's representatives if he dies before the period

The question one of construction and is transmissible

(1) Wms. 1220.

(2) Wms. 1230; 1 Jarm. 837, 4th Edn.; 794, 5th Edn.

of enjoyment arrives (1). It is thus a question of construction, and must, therefore, be governed by the rules of construction of wills, the intention of the testator being the governing principle.

In cases where the vesting is postponed, the legacy is contingent, and it comes within the operation of section 107 (S), *infra*.

This section corresponds to section 19 of the Transfer of Property Act of 1882.*

§ 2. “**Vested.**”—The literal meaning of the word ‘vest’ is, to give or confer an immediate fixed right of present or future possession of or authority over (2). In its original sense, the word means *possession*, the term “vested” being nearly equivalent to “possessed” [see sec. 4 (P), *post*]. Thus, although “vested” refers not to contingency, it has come to be regarded as meaning something opposed to “contingent” or “conditional” (3).

In cases arising on wills in which the testator expressly declares that the legacies shall or shall not be *vested* at or until a particular period, the word “vested” has been frequently construed in a sense other than what its strictly legal meaning convey. Thus it has sometimes been regarded as meaning “transmissible,” sometimes as meaning “vesting in possession,” or “payable,” and sometimes as meaning “indefeasible.” But the distinct and definite meaning which the word “vested” legally bears must be attributed to it in construing the will in which it is used, unless there is evidence to be gathered from the context, that the testator did not mean to affix that meaning to the expression [*Glanvil v. Glanvil*, 2 Mer, 38] (4). According to the latest authorities the word “vested” seems to convey the idea of proprietary interest. Thus a person is said to take a vested interest in property (real or personal) when he acquires a proprietary interest in it, either in possession or in remainder (5).

The word “vest” is ordinarily applied in relation to—

- (a) a right of present enjoyment, as *vested in possession* ;
- (b) a present right of future enjoyment, as *vested in interest* ;
- (c) a right which is contingent ; as in the case of a legacy to D. in case A. B. and C. shall all die under the age of 18, or

* Section 19 of the Transfer of Property Act runs as follows :—

Where on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives or from a provision that if a particular event shall happen, the interest shall pass to another person.

(1) 1 Jarm. 799, 4th Edn.; 756, 794, 5th Edn.

(2) Webster.

(3) Hawk. 221, 222.

(4) Wms. 1263, 1264 ; Teeob. 504, 5th Edn.

(5) Underhill, 192, 193 ; Rawson's L. Lex.; Bigelow. 244, F. n.

(d) a right which is conditional, as where a legacy is bequeathed to A., on condition that he marries with the consent of B.

§ 3. **Vested interest.**—An estate or interest is *vested*, as distinguished from *contingent*, either when enjoyment of it is presently conferred, or when, if enjoyment is postponed, the time of enjoyment will certainly come to pass. In other words, an estate or interest is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment (1). Where the estate or interest is vested, the person entitled to it, must be in existence and ascertained, and his title must not depend on the happening of some future and uncertain event. For, "An interest limited to a person unborn or unascertained, or to a person on the happening of an uncertain event, is not a complete estate, or right of ownership, so long as the uncertainty continues as to the person entitled, or as to the event on which the title depends (2). Thus if a testator devise his property to A. for life, and after A's death to B., B's interest, though postponed in enjoyment of the *res* itself, is vested, because the time of enjoyment is certain to come to pass. In this case, if there be a further direction to the effect that, in the event of B. dying during the lifetime of A. the property should devolve on C., B's son, and B. actually so dies, the interest of C. which was contingent during the lifetime of B. becomes vested as soon as he dies [see *Monnothanath Biswas v. Rohillimoni Dasi*, I. L. R. 27 A., 406].

As regards this "certainty," it may be noted that, when we speak of the time of enjoyment or payment being certain, we mean that it must be certain that such time will come if the legatee lives long enough. "No doubt it is uncertain whether a legatee will ever attain a given age, but since he must attain it if he lives, this latter contingency is disregarded" (3). Thus where one S. executed a will and devised all his property to his daughter B. and nephew D., to take effect after his own death and that of his wife M., and D. alone survived the testator but predeceased M., it was held, that D. took a vested interest which was transmissible to his representatives. Here it was certain that if D. lived long, the time of his enjoyment would come after the death of M. [*Bilaso v. Munni Lal* (1911), 8 A. L. J. 577; I. L. R. 33 A., 558; *Bhagabati Barmanya v. Kali Charan Sing* (1911), 15 C. W. N., 393; 8 A. L. J. 433; 13 C. L. J. 434; 13 Bom. L. R. 375; 38 Cal. 468, followed]. (a)

4. **Contingent interest.**—An estate or interest is *contingent* if the right of enjoyment is made to depend upon some event or condition which may or may not happen, or be performed, or if, in case of a gift to take effect in future, it cannot be ascertained in the meantime whether there will be any one to take the gift. In other words, an estate or interest is contingent, when the right of enjoyment is to accrue, on an event which is dubious and uncertain (4). Thus where a testator bequeaths a legacy to D in case A, B, and C shall all die under the age of 18, the legacy to D. is contingent. So where a testator devises his property to A for life, but in case he dies under 21 then

(a) An interest subject to no condition is said to be vested *indefeasibly*. Interests subject to conditions are said to be *vested subject to be divested* when the condition is subsequent, and *contingent* when the condition is precedent. Salm. Jur. 236; Strah-will, 130.

(1) 1 Fearn. 2; 2 Fearn. 26; Bigelow, 244.

(2) 2 L. of Pro. 112.

(3) 35, 3rd Edn.; 507, 5th Edn.

(4) 244, 1 Fearn. 2.

over to B., B's interest is contingent. According to Messrs Underhill and Strahan, a contingent interest is one in which no proprietary interest is vested unless some condition precedent is performed (1).

"The difference between vested and contingent interest is the difference between a transaction into which a condition enters and one in which there is no condition."* An interest in property may be declared to arise either on the happening of an event which may or may not happen, or on the happening of an event which must happen some day, e. g., on the death of any given person. Where the happening is uncertain, there is a condition, and until this condition is fulfilled, the interest is only contingent. But where the event is sure to happen, or must happen, there is no condition such as is required to be fulfilled, and therefore, the interest is vested from the first. It is none the less vested because the enjoyment of it is postponed (2) (a)

A testator directed as follows:—"After my death my widow, being in possession for the term of her natural life of my properties, shall perform the *Iswar Seba* and other rites. My widow shall have power to adopt * * *. After the death of my widow, my brother's son and his sons and grandsons, * * * being in possession of my properties, shall perform the *Iswar Deb Seba*." The widow died without adopting any son.—In a suit by the testator's brother's son for possession of certain properties left by the testator, the question being whether the bequest to the plaintiff was contingent on the failure to exercise the power of adoption conferred on the widow, it was held that the brother's sons took a vested estate of inheritance, subject to the widow's life estate and liable to be divested by the adoption of a son by the widow [*Gooroo Das Mustafi v. Sarat Chandra Mustafi*, I. L. R. 29 C., 699; 6 C. W. N. 721].

(a) It is thus apparent that there are two kinds of contingency: contingency of the event and contingency of the person. There may be a third class where both the event and the person are uncertain; but this does not seem to be recognized as a distinct class (3). Contingent interest or ownership is something more than a mere chance or possibility of becoming the owner. That is, it is more than a mere *spes acquisitionis*. Thus I have no contingent interest because I may purchase the property or the owner may leave it to me by his will. Hence contingent interest is based not upon the possibility of future acquisition, but upon the present existence of a title which is inchoate or incomplete (4).

An interest is thus vested when the owner's title is already perfect; it is contingent when his title is imperfect but is capable of being made perfect on the happening or fulfilment of some condition. So that, in the former case he owns the right absolutely, in the latter conditionally (5).

It will further appear that, "vested interest" and "contingent interest" are such interests in property as are created by act of parties, as distinguished from those that are created by law. Thus the right of a son or daughter, or any other heir of a person to inherit his property after his death, is neither a "vested" nor a "contingent" interest [*Abdool Hoosein v. Goolam Hoosein*, I. L. R. 30 B., 304; 7 Bom. L. R. 742; see *Brahmadeo Narain v. Harjan Singh*, I. L. R. 25 C., 778, at 780]. Such right is merely a "hope or chance of succession which may be defeated by the act of some person having the present disposal of the property". It is a mere possibility. In *In re Parsons; Stockley v. Parsons* [L. R. 45 Ch. D. 51, at 55, 56]. Mr. Justice Kay said: "It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis* i.e., an expectation or hope of succeeding to his property."

(1) Underhil. 193.

(2) Wms. 1234; Shep. and Bro. Act IV. of 1832, pp. 69, 70. See, 2 Watson's Compendium of Equity, p. 1099.

(3) Page 466.

(4) Salm. Jur. 235-236.

(5) Ibid. 235.

Where a testator devised two freehold houses specially specified to his niece using the words "when she shall attain the age of 25," and bequeathed the residue to his brother; and the question was raised whether the niece took a vested or a contingent estate, it was held, she took a contingent estate upon her attaining the age of 25, so that the brother was entitled to the rents of those two houses immediately [*Re Francis; Francis v. Francis*, (1905) 2 Ch. 295].

A testator conferred by his will a life estate on his widow B., and provided that if she adopted a son, his properties would pass to that son after his death, but that if no son were adopted, those properties would pass absolutely to N., provided he lived in the testator's ancestral house; and that if N. or his descendants failed to live in that house the properties would pass to other specified relatives of the testator subject to the like condition; and finally, that should any such relatives fail to fulfill that condition, they would pass to any agnate, and such agnate failing, to any brahmin who would live there—the testator's ancestral house. No son was adopted by B., and in B.'s lifetime N. joined with her in conveying the house to a stranger. It was held, N.'s interest during the widow's lifetime was contingent, the contingency being her death without adopting [*Shyama Charan Bhattacharjee v. Sarup Chandra Sen* (1912) 17 C. W. N. 39].

§ 5. Vested in possession.—An estate is vested in possession when there exists a right of present possession or enjoyment. If for instance, a legacy be given in general terms, without specifying the time when it is to be paid or made over, it is due on the day of the death of the testator, and the legatee takes an immediately vested interest. Such a bequest is said to be vested in possession, because, there is a present right to the immediate possession or enjoyment of the thing bequeathed (1). "Vested in possession" is a legal term applied to a right of present enjoyment actually existing (2). So that an estate vested in possession is equivalent to saying "an estate in possession."

§ 6. Vested in interest.—An estate is vested in interest, when there is a present fixed right of future possession or enjoyment as this section provides (3). That is to say, an estate is vested in interest when the right to its future enjoyment has accrued, but its present enjoyment is delayed. Where the estate is contingent the right to such future enjoyment even has not accrued. "Vested in interest" is equivalent to "vested in right." [See *Srinivasa v. Dandayudapani*, I. L. R. 12 M., 411].

§ 7. Words necessary for vesting.—No particular words are necessary for the vesting of a bequest or legacy. "A bequest in favour of a person simply (that is without any intimation of a desire to suspend or postpone its operation) confers a vested interest." The words "*pariyapta haibek*," whether they mean "descend to," or "devolve or go," or "shall become vested," have the effect of vesting at once. Where the testator declared that all his ancestral and self-acquired properties, "shall descend (*i. e.* পরাণ হইবেক) in equal shares to the eldest son to be born to each of the daughters of my late brother, J. E., D'Silva, (namely), Mrs. C. P. & Miss. F. D. who are now alive," it was held, that the words "shall descend" conferred a vested interest, that is, the properties vested as soon as the eldest son was born [*Harris v. Brown*, I. L. R. 18 C., 621; 5 C. W. N. 729].

1 Fearn. 2; 2 Fearn. 25-27.

2 Harton. L. Lex.

3 Fearn. 25-27.

§ 8. Cases where legacy becomes vested in interest and is transmissible.—The general rule is this: A bequest to a person *payable* or *to be paid* at or when he shall attain 21 years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in praesenti solvendum in futuro* (i.e., a debt due at present to be paid at a future time), the words "payable" or "to be paid" being annexed to the payment and not to the gift itself [*Stapleton v. Cheales*, Prec. Ch. 317; *Shrimpton v. Shrimpton*, 31 Beav. 425] (1). See § 14 *infra*.

A., a testator, "set apart £200" in favour of B., to be paid to him in the following manner:—£50 to be paid on B. attaining the age of 21; £50 on attaining 25; and the rest, on attaining 30. The will contained no direction as to the intermediate income and there was no gift over of the principal. B. on attaining the age of 21 received the first mentioned £50, but died before he was 25. It was held, the bequest was a present gift and vested at once, the payment only being postponed, so that the legatee dying before 25, his legal personal representative was entitled to be paid the unpaid balance of the principal with income [*In re Couturier*; *Couturier v. Shea* (1907) 1 Ch. 470; *Gosling v. Gosling*, John 265].

Regard being had to the inartificial language of Indian wills it may be laid down as a general rule, that a bequest in the absence of anything to the contrary, becomes a vested interest in the devisee or legatee from the date of the testator's death [*Ammal v. Sawmi Pillai* (1911) 11 M. L. T. 27].

(1) **Where payment alone is postponed.**—That is to say, where the gift is clear, and by such gift "the payment or possession of the thing bequeathed is alone postponed," the legacy becomes vested in interest. Thus where a legacy of 100*l.* was bequeathed to an apprentice *to be paid to him* within six months after he should have fully served out his apprenticeship, and the legatee instead of serving his time, ran away from his master and died intestate after the period of his apprenticeship expired, it was held that the legacy vested in interest and was transmitted to his representatives [*Sydney v. Vaughan*, 2 Bro. Parl. ca. 254; *Jackson v. Jackson*, 1 Ves. Sen. 217] (2). So, if the direction be, "on the death of any or either of my said four sons or of the said R. & M. leaving lawful male issue, such male issue shall succeed to the capital or principal of the share or respective shares of his or their deceased father or fathers to be paid or transferred to them respectively on attaining the full age of 21 years," a vested interest will be conferred on the issue immediately on the death of the father [*Bramamayi Dass v. Jages Chundra Dutt*, 8 B. L. R. A. C. 400; *Manmatha Nath Biswas v. Rohillimoni Dasi*, 27 A., 406; *Narayan Iyer v. Anai Iyer*, (1912) M. W. N. (1913) 189].

A testatrix gave all her real and personal estate to trustees in trust for her children who attained 21 or married, and if more than one, in equal shares, with a gift over to other persons in the event of her death "without leaving any children surviving me." There was one child who survived the testatrix and died an infant. It was held that the child did take a vested interest at birth and that the gift over did not take effect [*Jones v. Jones* (1906) 1 ch. 570].

(a) **In case gift and direction to pay are distinct.**—That is, where there is a clear gift and an additional direction to pay at a future time. Or

(1) Wms. 1230, 1237.

(2) Wms. 1231; 1 Jarm. 837, 4th Edn. 795, 5th Edn.

in other words, where the gift and the direction to pay are distinct [see *De Souza v. Vaz*, I. L. R. 12 B., 145] (1), the inference is, that by separating the gift from the time of payment, the testator intended that the vesting should not be contemporaneous with the period of enjoyment. Thus, where a testator bequeathed a sum of money to trustees, in trust for his daughter for life, and after her death in trust to pay the same unto or between or amongst all and every the children of his daughter, as and when they shall respectively attain the age of 21 years, "*to whom I give and bequeath the same accordingly*," it was held that the legacy vested in the children at their birth. Here the words "*to whom I give, &c.*," constituted a gift independent of the direction to pay, so that the gift and the direction to pay were distinct [*In re Bartholomew*, 1 Mac. & G. 354] (2).

Raneemoni Dasi v. Premmoni Dasi [9 C. W. N. 1033] is a similar case. In that case the testator after giving authority to his wife, executors and trustees to adopt sons, and providing for certain expenses and giving a legacy to his wife (who was also an executrix) declared as follows: "In no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my estate and effects, both real and personal, * * * to such adopted son who shall survive my wife, if he shall have attained his age of 18 years during the lifetime of my wife, or on his so attaining such age after her decease, *to whom and his heirs I give devise and bequeath all the same*." It was held, that the words "*to whom and his heirs, &c.*," constituted a present gift independent of the direction to pay or make over. Here also, the gift and the direction to pay were distinct, so that the testator clearly intended to confer a vested interest upon the adopted son.

The difficulty in such cases is to decide whether there is a substantive gift and a direction to pay, or whether the only gift is in the direction to pay [see *infra* sec. 107 (S), § 5 (1)]. For instance, where the testator bequeathed certain sums of stock to trustees, to pay 40*l.* per annum to his daughter M. for life, and after her decease, "to pay, assign and transfer the sum of 1000*l.* stock equally amongst all the children of M., *to be paid and transferred to them when and so soon as the youngest should attain his or her age of 21 years*," and directed that, after the decease of his daughter, the dividends should be applied for the maintenance of the children; and at the death of the testator M. had four children, one of whom died before the youngest attained 21, and the youngest alone survived M.; it was held that the four children took vested interests in the stock, so that, the death of some of them before the youngest became 21, did not defeat the gift to them. In this case, as Sir L. Shadwell, V.-C., observed, there was in the first place, a clear gift to all the children in the shape of a direction to pay and transfer, followed by another direction to pay and transfer, "when and so soon as the youngest of such children should attain his or her age of 21 years." Thus there was a clear gift distinct from the direction to pay at a future time [*Chaffers v. Abell*, 3 Jur. 577; see *Williams v. Clark*, 4 DeG. & Sm. 472]. But if the direction be to pay and transfer unto and amongst children "*in manner following*," that is to say, "the shares of sons to be payable at 21, &c.," such direction will not be distinct from the time of payment, and so the rule will not apply.

(1) Hawk. 226; Bigelow. 255.

(2) 1 Jarm. 830, 4th Edn. 796 5th Edn.; Hawk. 226; Underhill, 200; Theob. 384 1st Edn. 306, 5th Edn.

[*Shum v. Hobbs*, 3 Drew. 93] (1). See *Maseyk v. Fergusson* [I. L. R. 4 C., 304] where *Shum v. Hobbs* (*supra*) has been distinguished.

In doubtful cases, * the construction may be assisted by reference to other limitations. Thus, where there was a gift for the children of a tenant for life, to be paid upon their attaining 25 years, and if but one child, the whole to become the property of such only child, upon his attaining 25, and be transmissible to his heirs, &c., it was held that none of the children took vested interest before 25, the gift, in the event of there being an only child, being clearly contingent [*Judd v. Judd*, 3 Sim. 525]. "It is hardly supposable," says Mr. Jarman, "that the testator could mean to create a difference of this nature between a plurality of objects and an individual object" (2). But if the bequest were to all the children of A. on their respectively attaining 21, "and if but one child, the whole to such only child," the contingency as to attaining 21 would not be imported into the gift to the single child, and the only child would then take a vested interest [*Walker v. Mower*, 16 Beav. 365; *King v. Isaacson*, 1 Sim. and G. 371; *Johnson v. Faulds*, L. R. 5 Eq., 268] (3).

Where a testator constituted his two disciples, S. and J. (aged 18 and 11 years respectively), his heirs, "subject to the conditions written below," and directed that out of the net income of his estate his trustees should expend Rs. 500 every year for the maintenance of each disciple, or pay that amount to each disciple every year, and that when J. should attain the age of 30 years the trustees should give to J. the net residue of his property remaining at that time, or in case of J.'s death, should give the same to S.; the question being what was the nature of the gift to J., it was held, that the gift was immediate and the property vested in J. on the testator's death. Sir Charles Sargent, C. J. said: "The first question is as to the nature of the gift to J., which depends on the construction to be placed on the appointment of him as heir "subject to the conditions written below," one of which is that the net residue of the property is to be given over to him when he should attain the age of thirty and be fit to carry on business transactions. We think this amounts to an immediate gift of the property on the testator's death to the person so designated, whilst postponing the period for the enjoyment of it * * *

* According to Messrs Underhill and Strahan. in doubtful cases, the following facts tell in favour of vesting (4) :—

(a) The fact that the testator has made a distinction between the gift and the time of payment or enjoyment of it (see *supra*).

(b) The fact that the intermediate interest is given to the legatee [see sec. 107 (S) § 6].

(c) The fact that a testator has directed the gift to be severed from his general estate, and held in trust, together with accumulations of income, for the legatee [see sec. 107 (S) § 6. (4)].

(d) The fact that the gift is a residuary bequest. See § 14 *infra*.

(e) The fact that after a gift to a class at a given age, the testator directs that the shares of those dying under that age shall go to the survivors. See § 10, *infra*.

(f) The fact that after a gift at a given age, the testator makes a gift over on another contingency (as death under the given age *without issue*). See § 10, *infra*.

(1) 1 Jarman. 837, 4th Edn., 795, 5th Edn.; Bigelow. 256; Hawk. 226; Theob. 384, 3rd Edn.; 506—7, 5th Edn.

(2) Jarman. 852, 4th Edn.; 811, 5th Edn.; Hawk. 227; Theob. 384, 3rd Edn.; 507, 5th Edn.

(3) 1 Jarman. 853, 4th Edn., 812, 5th Edn.; Hawk. 225 Hend. 224; Theob. *ibid*.

(4) Underhill, 194, 295.

until he was 30, or even later, if not fit to manage it, and, therefore, that according to the well established rule of construction the property vested in J. at the testator's death." [*Gosavi Shivgar Dayagar v. Rivett-Carnac*, I. L. R. 3 B., 463].

So, where a testator directed that the income should be paid weekly to W., his son, till thirty five, when the corpus should be paid to him, it was held that the son took a vested interest at the testator's death and was entitled to immediate payment [*In re Williams: Williams v. Williams* (1907) 1 Ch. 180].

(b) In case the only gift is in the direction to pay.—See sec. 107 (S), *infra*.

(c) In case intermediate interest is given or applied for the benefit of the legatee.—See sec. 107 (S), *infra*.

(2) Where a prior interest is created.—Where a prior interest is bequeathed to some other person, that is, where a person bequeaths a property to one for life, and after his decease to another, the interest of the second legatee is vested; and in such a case it is immaterial whether the testator uses words of remainder, or whether the future gift is expressed in a direction to pay (1). [See illus. (c) and (d), *supra*]. Thus where a testator, after describing his property, provided: "As to that when I am not alive my wife named Suraj is the owner of the property * * * and after her death my daughter M. is the owner of the said property;" it was held that the widow, Bai Suraj, took only a life estate in the property with remainder to M. after her death, and that M. accordingly, took a vested interest in the same, subject to the life interest given to the widow [*Lallu v. Jagmohan*, I. L. R. 22 B., 409; *Chunilal v. Bai Muli*, I. L. R. 24 B., 420; see *Jairam Narronji v. Kuberbai*, I. L. R. 9 B., 491, at 507].

So, if a testator bequeaths his residuary estate in trust to pay the annual income to A. during the three years immediately following the testator's death, and from and after the determination of such three years, upon trust to pay out of the capital of the said trust funds legacies to B. C. and D., these are vested legacies and they vest immediately on the testator's death. The legacy to B., therefore, does not lapse if B. dies during the three years after testator's death [*Re Boam: Shorthouse v. Annibal* (1911) 56 S. J. 142].

Similarly, if an estate is given prior to the attainment of 21 by the ultimate devisee, to some third person, to endure during the minority, the gift to the ultimate devisee is vested. Or which amounts to the same thing, if an estate be devised to A. when he should attain 21, and until he attains that age the property is devised to B., A. takes an immediate vested interest, not defeasible on his death under the prescribed age. In such cases, the gift is construed as a devise to B. for a term of years, with remainder to A. Thus where a testator devises lands to trustees until A. shall attain the age of 21 years, and if or when he shall attain that age, then to him in fee, the gift to A. is a vested estate in fee simple, subject to the prior interest given to the trustees. [See *Hanson v. Graham*, 6 Ves. 239; *Lane v. Goudge*, 9 Ves. 229; *Jones v. Mackilwain*, 1 Russ. Ch. 220; *Goodtitle v. Whithy*, 1 Burr. 228] (2). If, therefore, there is no prior interest, the enjoyment of the second legatee will not be

(1) Wms. 1245; 1 Jarnt. 853, 4th Edn. Theob. 385, 3rd Edn.; 508, 5th Edn.

(2) Wms. 223, 1240, 1241; 1247; 1 Jarnt. 805, 4th Edn.; Theob. 377, 3rd Edn. 497, 5th Edn.; 220, 237, 238.

postponed. So that, where a will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond the period of his majority, the legatee will be entitled to the possession of the property as soon as he attains his majority, unless the will confers an interest upon some person for the intervening period, or unless there is a prior estate [*Husenbhoy v. Ahmedbhoy*, I. L. R. 26 B., 319].

The special characteristic of this class of cases is that, there is a prior interest extending over the whole period for which the devise is postponed. In such cases, therefore, "the gift is in effect a devise of the whole estate *instantly* to the ultimate devisee, with the exception of a partial interest carved out for some purpose" (1). [See *supra* *Lallu v. Jugmohan* and *Chunilal v. Bai Muli*, where the principle has been applied by analogy].

(3) **Where prior interest is followed by gift over.**—Where there is a gift to a person for life, if she so long remains unmarried, followed by a gift over in the event of marriage the gift over or the remainder is not dependent on the contingency of the widow's marrying again, but is vested and takes effect immediately on the determination of her estate whether by marriage or by death [*Luxford v. Cheeke*, 3 Lev. 125; *Meeds v. Wood*, 19 Beav. 215] (2). The same construction prevails where the prior gift is to a spinster until marriage [*Eaton v. Hewitt*, 2 Dr. and Sim. 184; *Wardroper v. Cutfield*, 33 L. J. 605], or to a person until he becomes bankrupt [*Etches v. Etches*, 3 Dr. 441; *in re Akeroyd*: *Roberts v. Akeroyd*, (1893) 3 Ch. 393], with a gift over in case of marriage or bankruptcy (3).

But where the testator first makes an absolute gift for life, and then engrafts thereon a gift over to take effect on the marriage of such legatee, the conclusion is, that the gift over is not to take effect unless the contingency happens (4). In other words, if the gift over is solely dependent upon marriage a different construction will prevail. Thus in *Sheffield v. Lord Orrery* [3 Atk. 280], where A. devised his house &c., to his wife for life, upon this express condition only, that *if she should marry again*, then the house &c., should go forthwith to his eldest son and his issue. it was held that the gift to the son was a contingent limitation to take effect only on the wife's marrying again.

The distinction above indicated may be explained thus:—When the not marrying again is interwoven in the original gift (as the words "if she do not marry again" in *Luxford v. Cheeke*, *supra*, indicate), the testator is considered to have created an estate during widowhood, so that his subsequent reference to marriage is generally construed to indicate an intention that such estate may be determined by whatever may terminate the widowhood, whether marriage or death; and consequently the gift over is a vested remainder expectant thereon [*Browne v. Hammond*, Johns, 210, 213; *Meeds v. Wood*, 19 Beav. 215; *Underhill v. Roden*, 2 Ch. D. 494; *Pile v. Salter*, 3 Sim. 411] (5). But where the original

(1) Wms. 1247; 1 Jarm. 806, 4th Edn.; Hawk. 239.

(2) 1 Jarm. 802, 4th Edn.; 759 760, 5th Edn.; Bigelow. 251; Theob. 380, 3rd Edn.; 500, 5th Edn.

(3) Bigelow 251, F. n.; Underhill, 204; 1 Jarm. 804, 4th Edn.; 761, 5th Edn.; Theob. 380, 3rd Edn.; 500, 5th Edn.

(4) 1 Jarm. 803, 804, 4th Edn.; 760, 5th Edn.

(5) 1 Jarm. 802, 804, 4th Edn.; 760-761, 5th Edn.; Bigelow. 252.

gift is not so interwoven, that is, when the gift for life is absolute and unconditional, the gift over cannot take effect unless the contingency happens. That is, in such cases the gift over becomes solely dependent upon marriage, as in *Sheffield v. Lord Orrery*, (*supra*) (1).

§ 9. Effect of gift over upon vesting.—A gift over is where the direction is, that if a particular event shall happen, the legacy will go over to another person. Such gifts are sometimes considered as affording an indication in favour of an immediate vesting. For, although a gift to a person if he should live to attain a particular age, standing alone, would be contingent, yet, if it be followed by a limitation over in case he should die under such age, the gift over is considered as explanatory of the sense in which the testator intended the legatee's interest in the property to depend on his attaining the specified age, namely, that at that age it should become absolute and indefeasible, the interest in question, therefore, is construed to vest *instantly* (2). Thus in *Doe d. Hunt v. Moore* (14 East 601), where the devise was to M., "when he attains the age of 21 years," to hold to him, his heirs and assigns for ever; but in case he should die before he attained the age of 21 then over; it was held that the estate vested immediately (3). Here, if the devise to M. were simply if or when he should attain the age of 21, without further provision, it would have been contingent. But the subsequent provision, "but in case &c.," made the gift a vested one.

But the authorities are not very clear on the point, and it seems doubtful whether a mere gift over upon death under 21 will have the effect of vesting a prior gift contingent upon attaining 21 [see *Ridgway v. Ridgway*, 4 DeG. and S. 271; *Davies v. Fisher*, 5 Beav. 201] (4).

In *Bland v. Williams* (3 M. and K. 411), there was a bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends, and profits as might be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of 24, and then to divide the principal equally between them, with a gift over in case any of them should die, under 24 without leaving issue: and it was held that the bequest gave a present vested interest, with an executory gift over in case of death under 24 without leaving issue. In delivering the judgment of the Court, Sir J. Leach, M. R., observed: "whether in a gift of this nature (that is gift over upon death under 21), the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under 24, then the gift could not vest before that age. In this case the gift over is not simply upon the death under 24, but upon the death under 24 without leaving issue. If upon a death under 24, at whatever age, issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest with an executory devise (5) over in case of death under 24 without leaving issue" (6). According to Mr. Theobald, the above observations

1 Jarm. 803, 804, 4th Edn., 706-61, 5th Edn., Bigelow 251, 252, Theob. 250.

2 501, 5th Edn.

3 Jarm. 809, 4th Edn., 767, 5th., Wms. 1252, F. n., Hawk. 238; Bigelow, 252.

4 Bigelow, 252, Hawk. 238; 1 Jarm. 810, 4th Edn.; 767, 5th Edn.; Theob. 377.

5 5th Edn.

6 3d Edn., 411, 4th Edn.

7 411, an

the legatee, vests the principal. That is to say, where a legacy is given to a person at a future time, or on a given event, and the testator either gives him the intermediate interest, or directs it to be applied for his benefit, the Court considers the disposition of the interest to be an indication of the testator's intention that the legatee should have the principal, and on this ground holds such legacies to be vested [see *Re Gosling* (1903) 1 Ch. 448]. "It is well known," said Lord Cottenham, "that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime." [*Watson v. Hayes*, 5 Myl. and C. 125. See *Re Hart's Trusts*, 3 DeG. and J. 202] (1). Thus in *Stapleton v. Cheales* [Prec. Ch. 315], a bequest to A. when he attains 21, with a direction that the interest should be paid to him in the meantime, was held to be vested (2).

Where a testator bequeathed property to a legatee "when and so soon as he shall attain the age of 26 years," and directed his trustees until that age be attained to pay to the legatee a part of the income arising therefrom and to accumulate the balance, it was held by Neville, J. that the legacy was a vested one [*Wilson v. Nunbarnholme* (1911) 46 L. J. 684, 56 S. J. 34].

But this rule is applicable only where the direction to apply the income or some part of it is imperative. [*Fox v. Fox*, (a) L. R. 19, Eq. 286; *Re Turney*; *Turney v. Turney*, (1899) 2 Ch. 739].

(2). **Where interest given to other persons.**—Where the interest is given to other persons (as guardians or trustees) to be applied for the benefit of the legatee, as where a legacy is given to the children of A. when they attain 21, directing the interest to be laid out for the benefit of the legatees during their minority. [*Hanbury v. Graham*, 6 Ves. 239. See *Foncean v. Foncean*, 3 Atk. 645; (1816)].

(3). **Where interest given for a portion of the period.**—Where interest is given only for a portion of the period, i.e. the time fixed for the payment of the gift was to the children of A. when they should attain 25, with a direction that the interest should be applied for their maintenance during their minority, although there was no direction as to the application of the interest in the interval between the 21st and 25th year of each child, the legacy was held to be vested [*Davies v. Fisher*, 20 L. J. 401] (4).

(4). **Where subject of gift separated from the estate.**—Where the subject of the gift is to be once separated from the rest of the estate, and vested in trustees for the benefit of the legatee, though the interest may not be given in the meantime, but directed to accumulate and go with the capital. Thus in *Saunders v. Autier* [Cr. and Eq. 100] where a testator bequeathed

(a) In *Fox v. Fox*, the testator bequeathed a gift of £1000 in a direction to pay and divide amongst his children, and the gift was followed by a direction to apply the whole income for maintenance in the meantime, it vests, and notwithstanding there is a discretion conferred on the trustees to apply less than the whole income for the purpose. This case is distinguishable from *Re Parker* (16 C. D. 100) and *Turney v. Turney*, *Fox v. Fox*, was approved, but there was no argument on the point.

(1) Wms. 1239, 1241; 1 Jarm. 842, 4th Edn.; Hawk. 227, 229; Underhill, 200; Bigelow. 260.

(2) Hawk. 228.

(3) Wms. 1240; 1 Jarm. 842, 4th Edn.; Hawk. 228.

(4) Wms. 1241; Hawk. 230; 1 Jarm. 845, 4th Edn.; 803, 5th Edn.

certain stock to trustees upon trust to accumulate the dividends until A. should attain 25, and then to transfer the principal with accumulated dividends to A. absolutely, it was held that the legacy vested in A. although he was a minor at the testator's death and the testator intended that the enjoyment of it should be postponed until he attained that age [see *Love v. L'Estrange*, 5 B. P. C. 59; *Re Wrey, Stuart v. Wrey*, L. R. 30 Ch. D. 507; *Re Bevan*, L. R. 34 Ch. D. 716; *Greet v. Greet*, 5 Beav. 123. See the observations of Sir W. Grant. M. R., in *Hanson v. Graham*, *supra*, made with reference to the decision in *Love v. L'Estrange*, at 248] (1).

(5). **Where part of the income is subject to charges or annuities.**—Where part of the income of the fund is to be applied in payment of charges or annuities, if the whole of the remaining interest is given to the legatee. Thus if the bequest be to trustees in trust out of the income to pay an annuity to A., and to apply the remaining income for the benefit of B. during his minority, and when B. attains 21 to transfer the fund to him, B. will take an immediate vested interest [*Jones v. Mackilwain*, 1 Russ. 220; *Potts v. Atherton*, 28 L. J. Ch. 486] (2). See *infra* illus. (c) and sec. 106 (S) § 12.

(6). **Where discretionary power is given:**—Where a discretionary power is given to the trustees of the fund to apply all or any part of the income for the benefit of the legatee [*Pulsford v. Hunter*, 3 Pro. C. C. 416; see also *Leake v. Robinson*, 27 Ch. 361], or either to apply the interest to maintenance or to accumulate it [*Vaudry v. Gadder*, 1 R. and M. 393], the bequest will not be vested [see *Merry v. Hill*, L. R. 10 Q. B. 619] (3). Mr. Theobald, however, holds a contrary view. He says, "The bequest in question now seems to be that it will" (4) (a).

(7). **Where the gift of the interest and of the principal are separate.**—That is, where the interest or dividends alone are the subject of

(a) It seems to be now a settled rule of construction that where there is a gift by will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age with a direction that in the meantime the income of the share shall be applied for his maintenance, the gift is a vested one [*Re Gosling* (1903) 1 Ch. 448]. But where a testator gives the residue to a class of persons on their attaining 21 in equal shares, and directs the income of the whole fund during their minorities to be applied for the maintenance of all indiscriminately the gift will be a contingent one and not vested [*Re Parker* (1892) 68 Ch. D. 44]. In that case Jessel, M. R. says: "In my opinion when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given, and not the less so, when there is superadded a direction that the trustees shall pay the whole or such part of the interest as they shall think fit: but I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested gift in a member of the class who does not attain that age." [See *Re Mervin* (1897) 15 Ch. 377, and *Re Gosling*, *supra*.]

It would however appear that no absolute gift of a contingent interest on a direction to apply the whole income for maintenance "at the discretion of the trustees or otherwise," but in each case the whole frame of the bequest must be looked at to ascertain whether the gift is of the interest for maintenance or of the principal for maintenance out of interest [see *Re Williams*: *Williams v. Williams* (1893) 15 Ch. 377].

(1) Wms. 1239, 24; 11 Jur. 848, 4th Edn; 806, 5th Edn; Theob. 508, 5th Edn; Hawk. 230, 231; Underhill, 195, 202.

(2) Hawk. 229; Underhill, 201; Theob. 509, 5th Edn.

(3) Hawk. 229; Stokes. 90; 1 Jarm. 844, 4th Edn.; 802, 5th Edn; Hend. 240; Underhill, 202.

Theob. 387, 3rd. Edn.

bequest until a particular time, and the principal is directed for the first time to be taken out of the residue, and paid or transferred to the legatee at the end of that period, the vesting of the principal will be postponed. Thus in *Batsford v. Kebbell* [3 Ves. 263], where the testatrix directed the dividends on 500*l.* to be paid to R. E. until he should arrive at the age of 32, and then to transfer to him the said principal for his own use, it was held that the dividends were a distinct subject of legacy and the principal did not, accordingly, immediately vest in the legatee [see *Watson v. Hayes*, 5 Myl. and Cr. 125; 9 Sim. 500] (1). In *De Souza v. Vaz* [1. L. R. 12 B., 137], Mr. Justice Farran expressed an opinion to the effect, that *Batsford v. Kebbell* (*supra*) must be held either as overruled, or as having been decided upon the peculiar terms of the particular will there construed. [See *In re Hart's Trusts*, 3 DeG. and J. 195; *Pearson v. Dolman*, 1. R. 3 Eq., 315.

(8). **Where the gift of the interest is contingent.**—That is, when the interest is not given in the *meantime*, but is itself given at the same time as the principal, so that the interest is to follow the fate of the principal, the principal will not be vested. Thus a legacy to A as soon as she attains 21 *with interest*, is contingent. Or, if the gift be “I bequeath to A. when he attains 18, the sum of 1000*l.* *with interest* (not with interest in the *meantime*), it will not vest the principal [*Knight v. Knight*, 2 Sim. and Stu. 490]. So in *Morgan v. Morgan* [4 DeG. and Sm. 164,] a gift of 5000*l.* to A. upon marriage “with the accumulations of interest thereon from my death,” was held to be contingent (2).

§ 7. **Result of the authorities.**—The “Exception” seems to embody the result of the authorities noted in § 6, *supra*. It may be added, these authorities, though not very clear, seem to point to the following further conclusions:—(a), that the gift of intermediate interest must be *eo nomine*, i.e., by the very name of interest, because interest being a premium or compensation for the forbearance of the principal, the payment of the interest raises an inference of title to the principal; (b), that where interest is payable as maintenance, the latter must be co-extensive with the whole amount of the interest; and (c), that the gift must be of the whole interest, which alone favours vesting (3).

It has, however, been held that a gift of a fixed sum for maintenance will not vest a legacy, although such sum may be equal to the whole interest [*Boughton v. Boughton*, 1 H. L. Ca. 406] (4).

§ 8. **Intermediate interest when the gift is to a class.**—A gift of the interest operates as well where the bequest is to a class, as where it is to an individual, provided that each member of the class has a distinct title to the interest of his own share; but when the interest is given as a common fund for the maintenance of all the members of the class, until all have attained the prescribed age, it does not vest the legacy [see *LLOYED v. LLOYED*, 3 K. & J. 20; see also *Re Parker*, *Barber v. Barber*, 16 Ch. D. 44; *Re Mervin v. Crossman*, (1891) 2 Ch. 197] (5).

(1) Wms. 1242, 1243; Hawk. 229; 1 Jarm. 845, 4th Edn.; 805, 5th Edn.

(2) Wms. 1244; 1 Jarm. 847, 4th Edn.; 805, 5th Edn.; 805, 5th Edn.; Hawk. 230; Underhill, 201.

(3) See foot note to § 6 (5) *supra*; and also Wms. 984, 10th Edn.; 1 Jarm. 804, 5th Edn.; Hawk. 227.

(4) Hend. T. S. 112, 2nd Edn.; Underhill, 201.

(5) 1 Jarm. 846, 4th Edn.; 804, 5th Edn.; Underhill. 201.

49. [108 (S)].—Where a bequest is made only to such

Vesting of interest in a bequest to such members of a class as shall have attained a particular age.

members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 3. <i>Reason of the rule.</i> |
| § 2. <i>Gift to a contingent class and to a class upon a contingency.</i> | § 4. <i>A corollary.</i> |
| | § 5. <i>Exception.</i> |

Extent of the section.

This section is extended to the Hindus, Jains, Sikhs and Buddhists.

§ 1. The section.—This section deals with gifts to a contingent class. The attainment of a particular age is here made the condition precedent to the vesting of the property, so that, those who at the time when the persons to take have to be ascertained have not attained that age, are excluded [see *Maseyk v. Fergusson*, 1 L. R. 4 C., 304].

This section corresponds to section 22 of the Transfer of Property Act (Act IV of 1882), which runs as follows:—Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

§ 2. Gift to a contingent class and to a class upon a contingency.—There is a distinction between a gift to a contingent class, and a gift to a class upon a contingency. Where the bequest is to children *who* shall attain 21, or to such children *as shall attain* 21, the gift is to a contingent class; but if the bequest is to children *at, upon, or when* they attain 21, the gift is to a class upon a contingency. In the former, the legacy will only vest in those who attain 21 (this section), even though there may be a gift of intermediate interest, or other circumstances, which in a gift to a class upon a contingency, would have the effect of vesting the legacy as we have already seen [see Exception, § 107 (S) *supra*; *Bull v. Pritchard*, 1 Russ. 213; *Duffell v. Duffield*, 1 Dow. and Cl. 268; *Leake v. Robinson*, 2 Mer. 363] (1).

§ 3. Reason of the rule.—In cases of gifts contemplated by this section, the particular age is introduced into and made a constituent part of the description or character of the objects of the gift, and thus there is no gift except to the persons who answer that description or character. In the words of Best, C. J., “The estates are not given to any particular children by name, but to such children as shall attain the age of 21 years; until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under the will; and therefore there is no person in whom the estates can vest” [*Duffield v. Duffield, supra*] (1).

§ 4. A corollary.—It is therefore clear that where the gift is to a class when the youngest shall attain 21, all who attain that age will take vested interests, to the exclusion of those dying under it. Thus in *Leeming v. Sherratt* [2 Hare. 14] the testator bequeathed a fund to trustees in trust to sell, “and to pay and divide the money arising therefrom, so soon as my youngest child shall attain the age of 21, unto and equally amongst my children, share and share alike”; and directed that in case of the death of any of the children leaving issue, such issue were to take the share which the parent so dying would have been entitled to; and it was held by Sir J. Wigram, V.-C. that a child who attained his majority but died before the youngest attained 21, was entitled to a share of the fund, though no child who did not attain that age was so entitled, the testator having postponed the division till the youngest child attained 21 [see *Ballin v. Ballin*, I. L. R. 7 C., 218; 9 C. L. R. 28; *De Souza v. Vaz*, I. L. R. 12 B., 137] (2).

It seems, the rule will apply where the income of the fund is directed to be applied for the maintenance of all the children during their minority [see *Lloyd v. Lloyd*, 3 K and J. 20], although the interest be given to be applied for the benefit of the children, expressly until the youngest child attains twenty-one [*Cooper v. Cooper*, 29 Beav. 229] (3).

§ 5. Exception.—But if the bequest is not to a class, but to individuals, the above rule will not hold good. Thus where a testator devised his property to trustees upon trust to raise out of the rents and profits an annuity of 100*l.* for his wife, and to apply the remainder for the maintenance of his “said children” till the youngest should attain 21; then upon trust to sell subject to the annuity, and pay the monies arising therefrom unto and between his “said children” in certain proportions; it was held that the children’s shares were vested at the testator’s death, and were not contingent on their attaining 21 [*Cooper v. Cooper, supra*] (4).

(1) 1 Jarm. 854, 4th Edn.; Wms. 1249-50; Hawk. 242.

[203.

(2) 1 Jarm. 91, 4th Edn.; Wms. 1250; Theob. 512, 5th Edn.; Hawk. 223; Underhill,

(3) Hawk. 242.

[203.

(4) 1 Jarm. 852, 4th Edn.; Wms. 1250; Theob. 512, 5th Edn.; Hawk. 234; Underhill

The Hindu Wills Act.

(PART XIV, ACT X, 1865.)

OF ONEROUS BEQUESTS.

50. [109 (S)].—Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Onerous bequest.

Illustration.

A having shares in (X), a prosperous joint stock company, and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies. B refuses to accept the shares in (Y). He forfeits the shares in (X).

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Onerous bequest and bequest upon a condition.*

Extent of the section.

This section is extended to the Hindus, &c.

§ 1. **The section.**—This section seems to contemplate cases, as appears from the illustration, where, by the same will, several properties, some of which are beneficial and others onerous or burdensome, are given to the same person, not *separately and independently* as in the next section, but *together* as one entire gift.

§ 2. **Onerous bequest and bequest upon a condition.**—There is a distinction between a bequest imposing an obligation i.e., onerous, and a bequest upon a condition, i.e., conditional bequest. In the former, the thing bequeathed is itself so burdensome that its possession or enjoyment necessarily depends upon the performance of the obligation; whereas in the latter, it is not the possession or enjoyment, but it is the very vesting of the legacy that depends upon such performance. See *post*, sec. 113 (S), Intro. no.

This section may be compared with section 127 of the Transfer of Property Act (IX of 1882)

51. [110 (S)].—Where a Will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

One of two separate and independent bequests to same person may be accepted, and the other refused.

Illustration

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He shall not by this refusal forfeit the money.

NOTES AND COMMENTARIES.

§ 1. *The section.*
§ 2. *Question one of intention.*

§ 3. *"Two.....bequests."*

Extent of the section

This section is embodied in the Hindu Wills Act and applies to the Hindus, Jains, &c.

§ 1. **The section.**—This section reverses the rule laid down in *Talbot v. Lord Radnor* [3 My. and K. 252] which seems to have furnished the above illustration. In that case it was held that the legatee must take both the bequests or neither, that is to say, she must take the benefit *cum onere* (1). Sec. sec. 167 (S), § 2. *Test.* However, in *Andrew v. Trinity Hall* [9 Ves. 552] it has been determined that in such cases, the legatee is generally, at liberty to accept the beneficial and reject the onerous gift (see *Warren v. Rudall*, 1 J. & H. 4; *Moffett v. Bates*, 3 Sm. and G. 468; *Aston v. Brown*, 22 W. R. (Eng.), 893; 23 L. J. Ch. 755] (2).

§ 2. **Question one of intention.**—But the question in these cases is one of intention to be gathered from the will. Therefore, the onerous and beneficial legacies are given together as one entire gift, and not as separate and independent gifts, or there is an intention that the legatee shall not take one without the other, he must take all or none (*Green v. Britten*, 42 L. J. Ch. 117; *Guthrie v. Walrond*, 22 Ch. D. 573; *Law Life Assurance Society* (1896) 2 Ch. 511] (3).

§ 3. **"Two.....bequests."**—Mr. Jarman, in citing *Andrew v. Trinity Hall*, *supra*, "where by the same will several bequests are given to the same person, some beneficial and the others burdensome, the legatee is generally at liberty to accept the former and reject the latter" (4).

See section 127 of the Transfer of Property Act (1882).

- (1) Wms. 1454; 1 Jarm. 450, 4th Edn.; 422, 5th Edn.; Theob. 105, 5th Edn.
- (2) 1 Jarm. 450, 4th Edn.; 422, 5th Edn.; Wms. 1455; Theob. 104, 5th Edn.
- (3) Hend. 273; 1 Jarm. 422, 5th Edn.; Theob. 104—5, 5th Edn.
- (4) 1 Jarm. 422, 5th Edn.; 449—50, 4th Edn.

The Hindu Wills Act.

(PART XV, ACT X, 1865.)

OF CONTINGENT BEQUESTS (a).

52. [111 (S)].—Where a legacy is given if a specified uncertain event (b) shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.

Bequest contingent upon a specified uncertain event, no time being mentioned for its occurrence.

Illustrations.

(a) A legacy is bequeathed to A, and in case of his death, to B. If A survives the testator, the legacy to B does not take effect. [See *Cambridge v. Rous*, 8 Ves. 12].

(b) A legacy is bequeathed to A, and in case of his death without children, to B. If A survives the testator, or dies in his lifetime leaving a child, the legacy to B does not take effect. [See *Edwards v. Edwards*, 15 B. 357].

(a) A bequest subject to a condition where such condition is precedent, is a contingent bequest, and it cannot take effect unless the condition is fulfilled [sec., 107 (S) *supra*]. It is, therefore, a future interest. But where the condition is subsequent, the bequest takes effect or vests only to be divested or determined on the fulfilment of the condition. A condition subsequent attached to a subsisting interest is often a condition precedent to the rise of a future interest. Thus for instance, a gift is made to A., subject to the condition that if A. dies without issue, it will go to B. the death of A. without issue is a condition subsequent to A.'s interest, but precedent with regard to that of B. Such a case comes under section 107 *supra*; but if the time of death without issue is mentioned in the instrument it is governed by this section, 12.

(b) "Uncertain event" is a condition as distinguished from a contingency which has reference to an event which is doing or not doing some act (see ante def. will under "Contingent will"), it seems in regard event by which the term "condition" is defined by almost all authorities, including the Act. But inasmuch as, conditional bequests and contingent bequests are separately treated in the Act, it seems reasonable to suppose that the word "event" in this section is used in a sense implying something the happening of which is beyond one's control. If, however, it must be conceded that a condition properly so called, that is, something which has to be performed, its performance being within one's own power (where of course the condition is not impossible), is excluded from the operation of this section, so that, this section only applies where the condition on the fulfilment of which the bequest is to take effect is some act which has to be performed and not some event which has to happen.

Where a testator directs that when his daughters married, and if they desired to live in separate houses, such houses should be built for them, and by another clause which stood by itself fixed the amount of maintenance to be paid to them, it was held, that the payment of maintenance was not made contingent on the marriage of the ladies and the section did not apply. [(1910) *Chandra Kishore Roy v. Prasanna Kumari Dasi*, (1910) 15 C. W. N. 121 P. C. 38; 21 M. L. J. 116; 38 C., 327].

(c) A legacy is bequeathed to A when and if he attains the age of 18, and in case of his death, to B. A attains the age of 18. The legacy to B does not take effect. [See *Hume v. Pillans*, 2 My. & K. 23].

(d) A legacy is bequeathed, to A for life, and after his death to B and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B shall die without children during the lifetime of A.

(e) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's death," to C. The words "in case of B's death" are to be considered as meaning "in case B shall die in the lifetime of A."

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 4. <i>Illustration (b).</i> |
| § 2. "No time is mentioned for the occurrence of that event." | § 5. <i>Illustration (c).</i> |
| § 3. <i>Illustration (a) [Reason of the rule].</i> | § 6. <i>Illustration (d).</i> |
| | § 7. <i>Illustration (e).</i> |
| | § 8. <i>The conclusion.</i> |

Extent of the section.

This section applies to the Hindus, Jains, &c.

§ 1. **The section.**—This section may be compared with section 107 (S), *ante*. Under that section a legacy bequeathed under certain circumstance does not vest until certain event happens or does not happen. But under this section, a legacy bequeathed almost under similar circumstance, cannot take effect at all, unless certain event happens before the period when the legacy becomes payable or distributable. In both, however, the legacy is contingent, that is, such as depends upon the happening or not happening of some uncertain event.

This section lays down a hard-and-fast rule regulating the validity of certain classes (a) of contingent bequests which, to use the words of Lord Macnaghten, "must be applied wherever it is applicable, without speculating on the intention of the testator" [Monohar Mukerjee v. Kasiswar Mukerjee, 3 C. W. N. 478, at 482; *Marendra Nath Saha v. Kamalbasini Dasi*, I. L. R. 23 C. 563; I. L. R. 23 I. A. 18]. It does not, accordingly, embody a rule of construction for giving effect to the

(a) The peculiarity of this class is that where no time is mentioned and death is spoken of as a contingency, there is in reality no contingency, but a contingency has to be created. Thus, the words "in case of his death" in illustration (a) do not themselves constitute a contingency; they only furnish a ground for supposing that the testator meant to speak of death as a word of contingency. Death is certain, but its time is uncertain. Death can be made uncertain only by associating it with something indicating the time of its occurrence. Thus death without issue (that is, before the birth of issue or after possibility of such birth is extinct), death before 21, and so forth, are all contingents. So it is clear that unless the words "in case of his death" are made contingent, their effect cannot be given to the testator's intention, which as seen above, is a contingent bequest. In these circumstances the Legislature have provided that, where no time is mentioned, the so called uncertain event must be associated with "before the period when the fund bequeathed is payable or distributable." If, therefore, the words "in case of his death" be joined to the words "before the period when the fund &c.," the whole is clear,—the gift becomes a contingent one in its true and literal sense and the intention of the testator is rendered capable of being carried into effect. Hence, it is "a hard-and-fast rule" and not a rule of construction.

intention of the testator. Where, therefore, a testator bequeathed to one K. a legacy with the proviso that if "after the expiration of nine years from my death.....K. should die without son or grandson, then M shall get his (K's) properties;" it was held that the gift over to M. did not take effect, inspite of the fact that the testator expressly declared that such gift would take effect if K's death happened at any time after the expiry of nine years from his death [*Monohur Mukerji v. Kasiswar Mukerji, supra*].—In this case, the word *death* is evidently treated as a word of contingency.

This section applies only where the prior bequest is capable of taking effect and is not *ab initio* void. Where a testator by his will authorized adoptions in a manner which was held to be invalid, and directed that, "in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age (of 18 years) without leaving a son or sons, I desire and direct my executors after the death of my said wife * * * * to make over and divide the whole of my estate * * * unto and between my daughters in equal shares to whom and their respective sons I give, devise, and bequeath the same"; it was held, that, inasmuch as the prior bequest to the adopted son was void *ab initio*, this section did not apply to the case although the period of distribution had arrived [*Radha Prasad Mallick v. Rammoni Dasi, and Peary Lal Mullick* 3 Cal. L. J. 502; 10 C. W. N. 695; I. L. R. 33 C., 947]. It was also held, that the prior bequest failing *ab initio*, the case was governed by sec. 116 (S), *post*.

§ 2. "No time is mentioned for the occurrence of that event."—

The time mentioned, must be some *definite point* of time. The words "after the expiration of nine years from my death," in the above mentioned case, "fix the nearer limit of time beyond which the specified uncertain event is to happen"; but they do not fix any "definite point of time at which, nor any further limit of time within which that event is to happen." Thus it stands to reason that, "the mere fixing of the nearer limit of time beyond which at any indefinite time an uncertain event may happen, cannot amount to the mentioning of a time for the occurrence of that event." The said words, "after the expiration of..... death," were, therefore, held, not to amount to the mentioning of such time for the occurrence of the specified uncertain event, as this section contemplates [per Mr. Justice Banerjee, (now Sir S. M. Woodas Banerjee) in *Monohur Mukherjee v. Kasiswar Mukherjee, supra*].

So, where a testator provided that on the death of one adopted son and until the adoption of another son, all his properties shall remain in the ownership and possession of his widow as his ordinary heir, it was held that the executory gift over in favour of the widow did not take effect. For no time is mentioned in the will for the occurrence of the uncertain event which in this case, is the death of the testator's adopted son (a) [*Manikyamala Bose v. Nanda Kumar Bose*, 4 Cal. L. J. 357; 11 C. W. N. 117; I. L. R. 33 C., 1305; *Jehangir v. Kai Khushru*, 13 Bom. L. R., 141].

The proviso, "where a contrary intention appears by the will," which occurs in certain sections of the Act, not being expressly attached to this section,

(a) Mr. Justice Mukerjee said: "Here a legacy is given to the widow of the testator if a specified uncertain event, namely, the death of the adopted son of the testator shall happen; no time is mentioned in the will for the occurrence of that event; the legacy cannot, therefore, take effect, unless the specified uncertain event, namely, the death of the adopted son happens before the period when the fund bequeathed is payable or distributable."

there is no reason for implying it. "The introduction of such a qualification into this section would make the enactment almost nugatory." Hence, even the expressed declaration of the testator cannot be allowed to control the plain meaning of the section [*Narendra Nath Sirkar v. Kamalbasini Dasi*, I. L. R. 23 C., 563; I. L. R. 23 I. A. 18; *Monohur Mukherjee v. Kasiswar Mukherjee*, *supra*].

In *Ellokassee Dasse v. Darpa Narain Bysack* [I. L. R. 5 C., 59], the testator, after devising his whole estate to his two sons, one son's son (minor) and his wife, in equal shares, provided that "if any of these four persons happen to die, which God avert, the survivors of them will receive this estate in equal shares." Here also *death* is treated as a word of contingency, and no time is mentioned in the will for the occurrence of that event. The question therefore, being what is the period of survivorship, or at what period must "any one of these four persons" die in order that the survivors may take,—it was held that the words "if any of these four persons, &c.," must be read as referring to survivorship at the period of the testator's death; "for otherwise it would not be a contingency for which the testator was providing, but a certainty." In delivering the judgment of the Court Mr. Justice Pontifex said: "According to well-known principles of construction, where the event of death, which of all events is the most certain and inevitable, is treated as a contingency, something else must be intended than merely to provide for the legatee dying at any time." The distinction between this case and that of *Soorjeemoney Dasse v. Dinobundhoo Mullick* [9 Moo. I.A. 123], lies in the fact, that the words "not leaving a son or son's son" which occur in the latter, are omitted in the former; so that, if this case is to be governed by that of *Soorjeemoney*, it would be necessary to remould the testator's language by adding the words so omitted, which it is not within the competency of any Court to do. The clause, in that case, would stand thus: "If any of the four persons happens to die without leaving a son or son's son &c."

But where a definite point of time is mentioned in the will for the occurrence of the event, the legacy takes effect at that time. Thus where the testator directed, "If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my grand-daughter shall become the proprietress of my property, and shall remain in undisputed possession thereof from generation to generation;" it was held that the effect of such direction was to confer an absolute estate on the grand-daughter upon the death of the widow [*Raj Mohan Mukherjee v. Secretary of State*, I. L. R. 7 C., 304; I. L. R. 8 I. A. 46; I. L. R. 349]. Similarly, the provision that, if the grand-daughter should be barren or a sonless widow, or should be otherwise disqualified, she should only receive an allowance, instead of being entitled to the property, was held to refer to the same date, that is, the death of the widow as the period mentioned for the occurrence of the event (*Ibid*). See *Guru Sami Pillai v. Sivakami Ammal* [I. L. R. 18 M., 1, I. R. 22 I.A. 219].

§ 3. Illustration (a) [Reason of the rule].—In this illustration, the legacy which is given to B., is to take effect only on the happening of the death of A., the prior legatee. But the death of A. is an uncertain event and no time is mentioned in the will for the occurrence of that event; it may happen either in the lifetime of the testator or after his death (and it is in this sense that *death* is mentioned as an uncertain event). The question, therefore, arises, at what point of time must A. die,—whether before or after the death of the testator, or any other event—in order that the

bequest to B. may take effect. Hence the rule under this section, according to which the gift to B. shall take effect, if the death of A. occur "before the period when the fund bequeathed is payable or distributable." And, as the period when the fund is payable or distributable, *i.e.*, the period of distribution, is here the death of the testator, it is clear, that the legacy to B. can take effect only in case of the death of A. before the testator's death. Therefore, if A. survives the testator, the legacy to B. or which is the same thing, the gift over to B. fails to take effect, and A. takes an absolute estate. For, it is an established rule that a bequest to one person, and in case of his death to another, is an absolute gift to the first legatee if he survives the testator [see *Home v. Pillans*, 2 My. and K. 15; *Cambridge v. Rous*, 8 Ves. 12; also *Narendra Nath Sircar v. Kamalbasini Das*, I. L. R., 23 C., 563] (1).

The reasons for the above construction are involved in some difficulty which arises from the testator using the word *death* as a word of contingency. As a matter of fact, death is not an uncertain event, but it is the most certain and inevitable of all events. To obviate this difficulty it is necessary to connect death with some such uncertain event as will render it contingent in association therewith. Such event is naturally the time of its happening, and such time is "before the period when the fund bequeathed becomes payable or distributable." Thus it follows that the *death* referred to is death in the lifetime of the testator, or death before the period of distribution, according as the gift is immediate (2), or it is to take place in future. Here the testator's death is the period of distribution, as already seen [see *Jackson's Estate*, 179 Penn. St. 77, 83; *Britton v. Thornton*, 112 U. S. 526]. So the rule may be stated thus: When *death* is spoken of as a word of contingency, it will be construed to mean death before the period of distribution, and such period is either the death of the testator or any subsequent period (3).

In this connection Mr. Hawkins says:—"Where a gift of the absolute interest in property to one person is followed by a gift of it to another in a particular event, the disposition of the Courts is to put such a construction on the gift over as will interfere as little as possible with the prior gift. When death is spoken of as a *contingent event*, a gift over in the event of death may well be considered to mean, not death at any time, but death before a particular period, *e.g.*, the period of distribution; and thus the gift over may be read as a gift by way of *substitution* and not of *remainder*" (4).

The rule in England is the same. It has been held there that, if there is an immediate gift to A. and a gift over in case of his death, or any similar expression implying death to be a contingent event, the gift over will take effect only in the event of A.'s death before the testator [*Cambridge v. Rous*, 8 Ves. 12; *Home v. Pillans*, 2 My. and K. 15]. This is so whatever be the form of expression, as, "if he die," "in case of his death," "should he happen to die," in case death "should happen to him," and so forth (5). Illustration (a) is in accordance with *Cambridge v. Rous*, *supra*.

§ 4. **Illustration (b).**—In this illustration the specified uncertain event is A.'s *death*, not as in the preceding illustration, but A.'s *death without children*.

(1) Hawk. 254, 255; Wms. 1266; 2 Jarm. 752, 4th Edn.

(2) As to what is immediate gift see § 98 (S) *ante*.

(3) 2 Jarm. 752, 4th Edn.; Bigelow. 245; Wms. 1266; Underhill. 230.

(4) Hawk. 254.

(5) 2 Jarm. 752, 4th Edn.; Hawk. 254; Theob. 575, 5th Edn.; Wms. 1266.

Death, which standing alone implies certainty, has been, here, rendered contingent, being associated with the uncertain event implied by the words *without children*. The contingency, *i.e.*, the death of A. without children, must therefore happen before the gift goes over to B. Under English law, as expressed by Sir John Romilly in *Edwards v. Edwards* [15 Beav. 357], "it has always been held, if at any time, whether before or after the death of the testator, A. died without leaving a child, the gift over takes effect, and the legacy vests in B." [See *Farthing v. Allen* 2 Mad. 310] (1). But here, the contingency must happen, not at *any time*, but "before the period when the fund bequeathed is payable or distributable," in order that the gift over to B. shall take effect. Therefore, from what is laid down here, that is, from the

How the English law differs.

words, "If A. survives the testator or dies in his lifetime leaving a child, the legacy to B. does not take effect", it seems to be clear, that, the point of time for the occurrence of the contingency is to be determined under this section not with reference to the period of its happening only, as under the English law, but with reference to the period of payment or distribution. Thus the law in reference to gifts in case of death of the prior legatee without children, is not the same here as in England.

The rule of law as explained by this illustration came under the consideration of their Lordships of the Judicial Committee in the recent case of *Narendra Nath Sircar v. Kamalbasini Dasi* [L. R. 33 I. A. 18; I. L. R. 23 C. 563; followed in *Lala Ram Jewan Lal v. Dal Koer*, I. L. R. 24 C. 406]. In

Narendra Nath Sircar v. Kamalbasini Dasi.

that case, the testator bequeathed his properties in these terms, "my three sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons dying sonless, the surviving sons shall be entitled to all the properties equally." The testator left three sons,—Jogendra Nath who was at the time of his (testator's) death, of full age, and Narendra Nath, and Surendra Nath, who were minors. All these sons survived the testator, and the son, Jogendra Nath, having died leaving a widow and six daughters, but no male issue, the question was whether on Jogendra Nath's death his surviving brothers or his widow became entitled to the share of the testator's property left by him. It was held by Sir W. Comer Petheram, C. J. and Mr. Jackson J., that as Jogendra Nath survived the testator, the gift over to his surviving brothers in the event of his death without male issue did not take effect, but that his widow as his heiress became entitled to his one-third share of the property left by the testator. Their Lordships said:—"We think that the request falls within that section (sec. 111) as explained by the illustration [illustration (b)]; the specified uncertain event in this case is the death of either of the three sons sonless. The legacy which is to take effect on the happening of the uncertain event is the gift to the survivors; and the section *** enacts in so many words that, unless the uncertain event happens before the fund is payable, *i.e.*, in this case, before the death of the testator, the legacy, *i.e.*, the legacy to the survivors, shall not take effect." In other words, according to this section as explained by this illustration, "the original gift to the three sons in equal shares became indefeasible on the testator's death." This decision was affirmed on appeal by the Privy Council [I. L. R. 23 C. at

High Court's decision.

Affirmed by P. C. 571]. But see *Soorjeemoney Dasi v. Dina Bundhu Mullick* [9 Moo. I. A. 123], where their Lordships of the Judicial

Committee referred the event of survivorship to the period of the son's death and not to that of the testator's death.

It was argued in *Narendra Nath's* case, that the fund was not "payable or distributable" within the meaning of this section, until the testator's younger sons attained their majority. But their Lordships of the Privy Council held that the period of distribution was the death of the testator. They said: "It would be impossible to hold that that period is to be postponed by reason of the personal incapacity of some of the beneficiaries" [*Narendra Nath Sircar v. Kamalbasini Dasi*, *supra*, at 573; *Lala Ram Jewan Lal v. Dal Koer*, I. L. R. 24 C, 406].

§ 5. Illustration (c).—This is in accordance with *Home v. Pillans* [2 My. and K. 15]. In that case the testator bequeathed in these words: "I give and bequeath to my nieces Catharine and Mary, * * the sum of 2000*l.* sterling each, when and if they should attain their ages of twenty-one years, * * * ; and in case of the death of my said nieces or either of them leaving children or a child, I give and bequeath the share or shares of such of my said nieces or niece so dying, unto their or her respective children or child." It was held by Lord Brougham on appeal (reversing the decision of Sir John Leach, M. R., to the effect that the interests of the nieces did not become absolute on their attaining the age of twenty-one), that the testator's nieces took an absolute interest in their legacies on attaining the age of twenty-one respectively. It was further held that the gift over was restricted to the contingency of death under twenty-one without children, the period of distribution being, when the nieces respectively attained twenty-one (1).

§ 6. Illustration (d).—This illustration seems to have been furnished by what is known as the fourth rule in *Edward v. Edwards* [15 Beav. 357], which laid down that, where there is a bequest to A., and if he die without children, then to B.—if the gift be in remainder after a life interest, the gift over will be restricted to the event of death before the period of distribution; or which is the same thing, the contingency of death without children will be confined to the life of the tenant for life. But this rule is no longer authoritative in England. It is now settled that the gift over will take effect on the death of B at any time without issue, whether before or after the tenant for life [*O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, 12 C. 408, —overruling the said fourth rule] (2). So in *Tara Churn Chatterjee v. Suresh Chunder Mookerji* [I. L. R. 17 C., 122], where the testator premised, "God forbid, but if my minor son should die and my daughter should be married &c.," directed his executor to "account for and make over whatever remains of the estate after payment of debts to my son when he comes of age," it was held, that the words "if my minor son dies," in connection with this direction, meant, "if my son dies during minority," so that, the direction had the effect of a gift to the son "to take effect at that time," i.e., when he came of age.—When the Indian Succession Act (Act X, 1865) was passed, the above mentioned fourth rule, as in force in England as a rule of construction (3).

The recent case of *Re Schnadhorst*; *Sandkuhl v. Schnadhorst* [(1902) 2 Ch. 234] is also an illustration of the rule laid down in *O'Mahoney v. Burdett* and *Ingram v. Soutten*, *supra*. Sec. 2 Jarm. 2167-2168, 6th Ed.

(1) Wms. 1267; 2 Jarm. 797, 4th Edn.; Hawk. 257; Hend. 246; Theob. 581, 5th Edn.

(2) Hawk. 257-58; 2 Jarm. 790, 791, 793 4th Edn.; Theob. 577, 5th Edn.

(3) *Edwards v. Edwards* was decided in 1852, and *O'Mahoney v. Burdett* and *Ingram v. Soutten*, in 1874.

§ 7. Illustration (e).—Illustration (d) and (e) are examples of future gifts, the gifts being in remainder after a life interest. In regard to such gifts Mr. Jarman says: "But although in the case of *immediate* gift it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made *ex necessitate rei*, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the object of his bounty; and consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease), the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession" (1).

Where a testator gave his estate to his widow for life with remainder to his children by name, adding a clause to the effect that should any one or more of such children die, the share or shares of such children should be divided between the survivors; the question turning upon what was the time of the death of the children, it was held that the death referred to was death during the lifetime of the testator [*Re Poultney: Poultney v. Poultney* (1912) 1 Ch. 245].

This illustration corresponds to the third rule in *Edwards v. Edwards*, *supra*.

§ 8. Conclusion.—The case of *Narendra Nath Sirkar v. Kamalbasini Dasi* [I. L. R. 23 C., 563; I. R. 23 I. A. 18] "must be taken as establishing that the ruling in the previous Privy Council cases (a) must for the future be limited by this section, where it applies. Where it does not apply, as for instance, in gifts or settlements *inter vivos*, their authority will remain untouched." [See *Virasangappa v. Rudrappa*, I. L. R. 19 M. 110] (2). The conclusion, therefore, seems to be that those Privy Council cases stand virtually overruled, so far as they follow and support the case of *Soorjeemoney Dossee v. Dinobundhoo Mullick* [See n. (1)] in cases coming within the operation of this section.

Where a bequest is made to such of ——— in persons as shall be surviving at some certain period, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will.

(a) That is, *Soorjeemoney Dossee v. Denobundoo Mullick* [6 Moo. I. A. 526; 9 Moo. I. A. 123; 14 B. L. R. 159; 4 W. R. P. C. 119], and the cases following it, such as, *Bisonath Chunder v. Bamasoondery Dasee*, [12 Moo. I. A. 48; 9 W. R. P. C. 1]; *Bhoobun Mohini Debya v. Hurrish Chunder Chowdry* [I. L. R. 4 C., 23; L. R. 5 I. A. 188; 2 C. L. R. 339; 14 W. R. 268]; *Tarakeswar Roy v. Shoshishekkharreswar Roy* [I. L. R. 9 C., 952, 6 C., 421; L. R. 10 I. A. 51; 13 C. L. R. 62]; *Kristoromoney Dossee v. Norendro Krishna Bahadoor* [I. L. R. 16 C., 383; L. R. 16 I. A. 29]; *Lalit Mohun Singh Roy v. Chukken Lal Roy* [I. L. R. 20 C., 906; 24 C., 834; L. R. 24 I. A. 76; 1 C. W. N. 387].

(1) 2 Jarman, 736 4th Edn. See also pp. 761, 762 of the same.

(2) Mayne, H. L. 544 (6th Edn).

Illustrations.

(a) Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

Here the testator's death is the period of distribution.

(*Cripps v. Wolcott*, 4 Mad. 11.)

(b) Property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.

Here A's death is the time of payment [Hearn v. Baker, 2 K. and J. 383].

(c) Property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that if B should not survive the testator, his children are to stand in his place. C dies during the life of the testator; B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.

Here the survivorship refers to the death of the testator [Rogers v. Towsey, 9 Jur. 575].

(d) Property is bequeathed to A for life, and after his death to B and C, with a direction that in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

Here the survivorship refers to the death of the legatee dying first. That is, on the death of B, it vests in C and upon his death it goes to his representative. [Scurfield v. Homes, 3 Bro. C. C. 90; White v. Baker, 2 DeG. F. and J. 55].

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *The question involved.*

§ 3. *"Such of them as shall be alive."*

§ 4. *"Contrary intention."*

§ 5. *Presumption as to survivorship.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the wills of Hindus, Jains, &c.

§ 1. **The section.**—The first half of this section seems to have been taken almost *verbatim* from Hargrave's "Construction," where the learned author says: "Where property is given to those of certain persons who shall be 'surviving' at some period, but the exact period is not specified

As to the reason for referring the *survivorship* to "the time of payment or distribution," the same learned author observes in continuation of the foregoing lines: "the general leaning of the Courts in favour of vesting is a reason for construing the survivorship to refer to as early a period as possible" (1).

This section corresponds to section 24 of Act IV of 1882 (The Transfer of Property Act), which runs as follows:—"Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer."

(1) Hawk. 260.

§ 2. The question involved.—This section seems to contemplate cases of gifts to persons subject to the proviso that they fulfil the condition of being alive at the date of an event “which though certain to happen may happen at any time.” The question therefore is, at what particular point of time are the person or persons fulfilling such condition, or answering the description of survivor or survivors, to take the property given to him or them as such. In other words, when are the survivors to be ascertained ?

This has been sufficiently answered in *Cripps v. Wolcott* [4 Mad. 11] which establishes the proposition that, in dispositions of property words of survivorship are to be construed as referring to the period of distribution which, when no life tenancy exists is at the testator's death; but *when a life tenancy does precede the gift*, survivorship relates to the time of the death of the person holding it. Thus, where M. bequeathed to a trustee a sum of money in trust to pay the interest to her husband N., for his life, directing that after his death the capital should be divided between her sons O. and P. and her daughter Q. *and the survivor or survivors of them*, share and share alike; M. died, leaving her husband and the said three children surviving; O. died in N.'s lifetime, and then N. died, leaving P and Q. surviving. Q. then laid a claim to a moiety of the stock purchased by M.'s gift, and the question was, to what period the survivorship related—to the death of M., the testatrix, or to that of N., the tenant for life. Sir John Leach, M. R., in deciding that the period was on the happening of the latter event, said: “* * I consider it, however, to be now settled, that if a legacy be given to two or more persons equally to be divided between them, or to the survivor or survivors of them, and there be no special intent to be found in the will, then the survivorship is to be referred to the period of division. *If there be no previous interest given in the legacy*, this period of division is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy.” (1). [See sec. 98 (S) *ante*, where the question is of survivorship in case of bequests to a described class of persons. There is much similarity between the questions involved in this and that section].

Mr. Hawkins gives the rule in these words: “In bequests of personal estate, words of survivorship are *prima facie* to be referred to the period of payment or distribution, and not to the death of the testator” [citing *Cripps v. Wolcott*, *supra*, and other cases]. Thus where a testator gave all his estate and effects to his wife, and after her death to his five cousins (naming them) *or the survivors of them*, as tenants in common, it was held that “survivors” had reference to the death of the widow, the life tenant, so that one cousin who alone survived her was entitled to the whole fund [*Hearn v. Baker*, 2 K. and J. 383]. So where a testator gave the interest of his funded property to his sister for her life, and after her decease to her surviving children, it was held that the word “surviving” referred to the sister's death [*Neathway v. Reed*, 3 D. M. G. 18] (2).

So, where property is bequeathed to several persons for life, and after the death of all to their surviving children, those children alone will take who are living at the death of the last tenant for life [*Stevenson v. Gullan*, 18 Beav. 590]. But if the tenant for life dies before the testator, the death of the latter will be

(1) Wms. 1471; Flood. 527, 528; 2 Jarm. 685, 3rd Edn.; 733, 4th Edn.; Theob. 595, 5th Edn.; Hawk. 261.

(2) Hawk. 261; 2 Jarm. 734, 735, 4th Edn.; Theob. 595-96, 5th Edn.

regarded as the period of survivorship, that being also the period of distribution [*Spurrell v. Spurrell*, 11 Hare 154] (1).

The rule in *Cripps v. Wolcott*, *supra*, seems to apply only where the gift to survivors is *Substitutional* (2).

§ 3. “Such of them as shall be alive.”—The words “such of them as shall be alive” are used in the same sense as the words “survivor or survivors,” or “such as shall survive.” It is thus immaterial whether the word “survivors” or “such as survive” be used [*In re Sharpe's estate*, 1 D. J. S. 453] (3).

The word “survivor,” must, *prima facie* mean, those surviving at the period spoken of by the testator, and no other, unless, of course, “Survivors,” mean—such meaning would violate the clear meaning of the rest of the instrument containing it [Lord Justice Turner, in *White v. Baker*, 2 De G. F. and J. 55] (4). It may, however, be a word either of limitation of an estate denoting the interest certain persons are to take, or it may denote a class of persons (5).

But the word is “more usually employed to denote the persons who are to take, and in such cases it must have its natural meaning, which is to outlive; that is to say, to be alive at and after the time of a particular event or death of a particular person, which event or person the other is to survive” [*Gee v. Liddell*, L. R. 2 Eq. 341] (6).

§ 4. “Contrary intention.”—Illustrations (c) and (d) are examples of “contrary intention.” The rule is that, if the testator express a different intention according to the natural import of the words of his will, the Court must yield to that intention and carry it into effect. But it must be taken as the deliberate doctrine of the Court to apply the rule [as laid down in *Cripps v. Wolcott*, *supra*] in every case where no very cogent reasons militate against such a construction (7).

Thus where a testator made a bequest of 1000*l.* stock to his wife for her life, with a direction that at her decease one-half of the produce to be received and divided amongst his surviving brothers and sister or their issue share and share alike, it was held by Sir J. Wigram, that the words “surviving” had reference to the testator's death and not to the period of distribution [*Shailer v. Groves* 6 Hare, 162; see *Rogers v. Towsie*, 9 Jur. 18]. Where there is a bequest to A. for life, and after his death to B. or the survivor of them, some meaning must, of course, be attached to the words “the survivor”. They may refer to any one of three events: to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life; and in the absence of any indication to the contrary, they are taken to refer to the latter event as being the more probable one to have been referred to. But when, as in the present case, the

(1) 2 Jarm. 735, 736, 4th Edn.; Theob. 471, 596, 5th Edn.

(2) Hawk. 265.

(3) Hend. 249.

(4) Flood. 524.

(5) Theob. 594, 5th Edn.

(6) Theob. 594, 5th Edn.

(7) 2 Jarm. 737, 4th Edn.; 1548, 5th Edn.; Wms. 1472; Hawk. 262.

(8) 2 Jarm. 737, 4th Edn.; 1548, F. N. (a), 5th Edn.; Theob. 597, 5th Edn.; Hawk. 263.

Turner L. J. in *White v. Baker*. bequest is to A. for life, and after his death to B. and C., and in case either of them dies in the lifetime of A., the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other" [*Per* Turner, L. J., in *White v. Baker*, 2 DeG. F. and J. 55] (1).

§ 5. Presumption as to survivorship.—There is no presumption as to the *time* of death. Under section 108 of the Indian Evidence Act (Act I. of 1872), however, when a person has not been heard of for seven years, a presumption arises that he is dead. Accordingly, where any person has to prove the *fact of death*, in the absence of direct evidence, he must prove it by this presumption of law; but when he has to prove the *time of death* he must prove it affirmatively, for there is no presumption that the death took place at any time in that seven years [*In re Lew's Trusts*, L. R. 6. Ch. 356; *Fanibhusan Banerjee v. Surjakant Roy*, 11 C. W. N. 883; 35 C., 25; *Narki v. Phekia or Lalsahu*, (1909) 14 C. W. N. 341; 11 C. L. J. 138; 37 Cal. 103].

The burden of proving that a person died at any particular time lies on the person who asserts that he did so die. [*Fanibhusan Banerjee v. Surjakant Roy supra*]. See Act I, 1872 (Evidence Act), sections 107 and 108.

The presumption of death may be raised, as a general rule, only by showing that there has been an unsuccessful effort to find the absent person by search and diligent enquiry at his last known place of residence and among his relations [*Rennard v. Bennett*, 76 Kansas, 848].

As to the time of death, it may be noted that, *Rennard v. Bennett*, (*supra*), is an authority for the proposition that if within the specified period the absent person is shown to have encountered some specific peril or to have been in the range of some impending or immediate danger which might reasonably be expected to destroy life, the Court may infer that death took place even before the expiration of that period [see *Davie v. Briggs*, 97 U. S. 628].

But when a Hindu disappears and is not heard of for a length of time, no right accrues to any person as his heir until after the expiry of 12 years from the date on which he was last heard [*Junmefu v. Keshub Lal Ghose*, 10 F. 20; *Sarada Sundari Debi v. Moni alias Braja Sundari*, 10 F. 20; 137, F. n.].

(1) Hawk. 837, see Theob. 597-98, 5th Edn.

The Hindu Wills Act.

[PART XVI, ACT X, 1865].

OF CONDITIONAL BEQUESTS.

INTRODUCTORY NOTES.

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| <p>§ 1. <i>What the Law Commissioners say.</i></p> <p>§ 2. <i>Condition defined.</i></p> <p>§ 3. <i>Condition precedent and subsequent.</i></p> <p>§ 4. <i>Conditional bequest and conditional will.</i></p> <p>§ 5. <i>Condition precedent or subsequent, determination of.</i></p> <p>§ 6. <i>English law as to conditions precedent.</i></p> | <p>§ 7. <i>English law as to conditions subsequent.</i></p> <p>8. <i>Difference between English law and Indian law.</i></p> <p>9. <i>Conditions valid or invalid.</i></p> <p>10. <i>Condition against public good.</i></p> <p>11. <i>Condition that legatee or devisee shall reform his character and lead a moral life.</i></p> <p>12. <i>Condition as to religion.</i></p> <p>13. <i>Condition of devisee or legatee being an adopted son.</i></p> |
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§ 1. What the Law Commissioners say.—The Law Commissioners say: "On the subject of conditions we have deemed it right to abstain from introducing into India the very refined distinctions which the Court of Chancery has, in questions relating to personal property, borrowed from the Ecclesiastical Courts. We think that the words of the will should be adhered to where no condition inconsistent with law or morality is sought to be imposed; that all bequests made upon illegal, immoral, or impossible conditions, should be void; and that wherever the testator's wishes can be carried into effect, if expressed in one way, they should be permitted to take effect, if expressed in any other way; so that where he can do by a limitation (a) he ought to be allowed to do by imposing a condition (a). It appears also, to us, that whenever a condition subsequent is valid if accompanied by a gift over, it ought to be valid

(a) "**Limitation**" and "**condition**."—"It is the province of a limitation to mark the period or event for the commencement, and the time of continuance or duration of an estate, either by years, lives, or the series of heirs; also the determinable qualities of an estate; as for twenty-one years, if A should so long live." But "a condition is a distinct clause, and its office is to defeat the estate on some event which happens, as on some act to be done, before the estate has filled the utmost measure or time appointed for its continuance. A limitation *will* necessarily determine the estate; a condition *may* defeat an estate. A limitation may *suspend* the vesting; a condition never interferes with the vesting, but may act on the estate or interest before or after it is vested. Every provision which regulates the vesting, is, in essence and effect part of the limitation" (1).

"When a clause stays or suspends the estate, or rather the gift, and makes it uncertain whether the gift shall take effect or not, that clause is properly a limitation, * * *. Also whatever provision *creates* or enlarges an estate, on a certain or an uncertain event, is of necessity a limitation. That clause only is a condition, which is to defeat the estate after it has been created or enlarged" (5). See secs. 82 (S) F. n., *supra* and 116 (S) *infra*, F. n.

without a gift over (1), and ought not to be treated as if it had been inserted merely to frighten the legatee by an unmeaning threat (2)."

§ 2. Condition defined.—"A condition is a kind of law, or bridle, annexed to one's act, staying or suspending the same, and making it uncertain whether it shall take effect or no; or as others define it, it is *modus*, a quality annexed by him that hath estate, interest, or right, to the land, &c., whereby an estate &c., may either be created, defeated, or enlarged, upon an uncertain event. A condition has uniformly the object of defeating or avoiding an estate" (3). Wharton defines 'condition,' to be a restraint annexed to a thing, so that by the non-performance the party to it shall receive prejudice and loss; and by the performance, commodity or advantage; or it is that which is referred to an uncertain chance, which may or may not happen (4). Thus a thing may be said to be "dependent upon a condition when it is made dependent upon an uncertain event, act, or omission" (a) (5).

§ 3. Condition precedent and subsequent.—Conditions are either precedent, or subsequent. "A condition is precedent when the happening of some uncertain event, or doing some act, is necessary to the creation of the interest dependent upon it; a condition is subsequent when an interest already created may be defeated or determined thereafter by the happening of some uncertain event, or doing or omitting some act" (6). In other words, conditions are precedent or subsequent, according as the performance of such conditions is made to *precede* the vesting of an estate, or their non-performance to *determine* an estate antecedently vested. So that where a condition is precedent the legatee has no vested interest till the condition is performed; and where it is subsequent the interest of the legatee vests in the first instance, subject to be divested by the non-performance or breach of the condition.

Or, as Mr. Salmond says, a condition precedent is one by the fulfilment of which an inchoate title is completed: and a condition subsequent is

(a) **Condition as a trust or motive.**—A condition is sometimes construed as a trust or a motive, as it may be construed as a 'limitation' (*supra*, n. (a)). A devise upon condition that the devisee shall make certain payments to certain persons within a certain time, is generally construed as a trust and not a condition, because the words importing the conditions impose a personal liability upon the devisee, creating a trust, rather than constituting strictly a condition on the breach of which the gift may fail [*Young v. Grove* 4 C. B. 668; *Cunningham v. Parker*, 146 N. Y. 29; See *Re Oliver* (1890), 62 L. T. 533]. As to when a condition may be construed as a motive or the reason for making the gift or the will see *ante*, def. of will, under "contingent will" (8).

Where a legacy was given on an expression of gratitude, in anticipation of services to be rendered by the legatee as executor, it was held the expression was one of motive for making the gift and that the rendering of service was not a condition on which it was made [*Chassaign v. Durrand*, 85 Md. 420].

Condition as opposed to absolute.—The word condition in its widest sense is also used as opposed to absolute, for estates may be devised absolutely or upon condition, all estates not absolute being necessarily conditional.

Condition and Contingency.—See *ante*, p. 22.

(1) Def. of See sec. 106 (S), § 9.

(2) Gazette of India, Extraordinary, 1st July 1864, p. 53.

(3) Shep. T. 117.

(4) Wharton.

(5) Bigelow. 263.

(6) 2 Parke. 5; Shep. T. 118; Bigelow. 268.

(7) 2 Jarm. 2, 4th Edn.; Wms. 1264.

(8) See Page. § 673.

one the fulfilment of which extinguishes a title already completed. In the former case, a title conditional is made absolute, and in the latter case what has already been lost conditionally, is lost absolutely (4).

§ 4. Conditional bequest and Conditional will.—A conditional legacy or bequest is one “whose existence depends upon the happening, or not happening, of some uncertain event, by which it is either to take place or to be defeated” (5). In other words, “when there is a quality added to the devise or legacy, whereby the effect of it is suspended or hindered, and it is thereby made to depend on some future event,” the devise or legacy is said to be a *conditional devise or legacy* (6).

A conditional *bequest* and a conditional *will* are two different things. In the former, a particular clause or portion only of the instrument, and in the latter, the whole instrument, is the object of regard. Besides, when the question is, whether the whole will is conditional, it seems, the authorities look with disfavour upon a construction which would prevent the will from taking effect (7).

§ 5. Condition precedent or subsequent, determination of.—No precise form of words is necessary in order to create conditions in wills, whether precedent or subsequent; but the same words will make a condition precedent or subsequent according to the nature of the thing and the intention of the testator [*Acherly v. Vernon*, Willes. 153]. In determining, therefore, whether a condition is precedent or subsequent, we must look, not merely to the language in which it is framed, but to the whole context of the will. The test is, “whether the testator intends that a compliance with the requisition which he has chosen to annex to the enjoyment of his bounty shall be a condition of its *acquisition*, or merely of its *retention*.” That is to say, as already seen, if the performance is required before the vesting of the gift, or the condition involves anything in the nature of consideration, it is a condition precedent [*Acherly v. Vernon*, *supra*; *Fitzgerald v. Ryan*, (1899) 2 Ir. 637]; whereas, if the gift is to vest before the time fixed for its performance, the condition is subsequent (8). Where the condition requires something to be done which will take time, it will argue in favour of its being construed as subsequent [*Peyton v. Bury* 2 P. W. 626; *Daddy v. Gresham*, 2 L. R. Ir. 443]. It is frequently exceedingly difficult to determine under which of these heads any particular gift comes. If, however, a condition is capable of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction [*In re Greenwood* (1903) 1 Ch. 749].

Examples. (1) Where a Hindu testator directed that a boy should be taken in adoption, and added, “to this boy, all the things mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him as my heir”; it was held that adoption was a condition precedent and that the boy not having been adopted could not take under the will [*Karamsi Madhooji v. Karsandas Natha*, I. L. R. 20 B., 718; *confd.* I. L. R. 23 B., 271; *Probodh Lal Kundu v. Harish Chandra Day*, 9 C. W. N. 309; *Appu Chetty v. Kuppammal*, I. L. R. 16 M., 355; *Anundmoyee Dabi v. Grish Chunder Myti*, I. L. R. 7 C., 772; I. L. R. 15 C., 66; L. R. 14 I. A. 137].

(1) Salm. Jur. 236.

(2) 1 Rep. Leg. 645, 3rd Edn. (Wms. 1264 and Wharton).

(3) Shep. T. 400.

(4) Bigelow. 267. See Def. ‘Conditional will,’ *ante* p. 18.

(5) 2 Jarm. 1, 3, 4th Edn.; Bigelow. 268, 269; Hend. 252; Wms. 1264; Theob. 492, 5th Edn.

(2) A testator made a bequest on condition that "should they * * * humbly apply for subsistence, they should receive certain allowance." Here *humbly applying*, that is, using language of humility, was a condition precedent [*Veerabhadra Raju Bahadur Garu v. Chiranjivi Raju Garu*, 28 M., 173; 15 Mad. L. J. 111]. So a condition to the effect that the devisee should be of good character and obedient to his mother, is a valid condition precedent and not bad for vagueness [*Surendra Nath Ghose v. Kala Chand Bannerjee*, 12 C. W. N. 668; *Hawke v. Euyart*, 27 Am. St. Rep. 149] (1). So, where a widow in making a gift to the son of her co-widow, said—"the funeral cake will be preserved to us by you, and on my death the taluk is your rightful property" it was held, the gift was conditional on presenting the funeral cake [*Krishna Soondery Dabca v. Ramee Krishto Motu*, (1863) Marsh. 367].

(3) In a case, however, where the testator directed that "if the boy so adopted to me * * be honest and faithful to my said wives and prosecute his studies up to the M.A. standard of any Indian University, then my executor shall hand over my properties to my such adopted son on his attaining majority." It appeared that the adoption took place on the 15th February, 1909, and the boy adopted attained his majority on the 19th April 1909 when he was reading in the Matriculation class. It was held that the said conditions were conditions subsequent and the vesting of the property in such adopted son did not depend on those acts on his part [*Rajendru Chandra Mitra v. Manik Lal Ghatak* (1911) 8 A. L. J. 1063].

It may be submitted that this decision seems to have been arrived at without the words "such adopted son" being pressed on the notice of the Court.

§ 6. English law as to conditions precedent.—In England, with respect to conditions precedent which are impossible, a different rule is applicable to bequests of personalty from that which is prevalent respecting devises of realty. By the Common law, which applies to real property, if a condition precedent is impossible, the devise will be void. [See *Egerton v. Earl of Brownlow*, 4 H. L. ca. 1]. But as to personal property to which the Civil law applies, it will take effect notwithstanding such condition. For, by the Civil law which has been adopted by the Courts of Equity in England, when a condition precedent is impossible, "the bequest is single, *i. e.*, discharged of the condition," and the legatee is entitled as if the legacy were unconditional. That is to say, under the Civil law, it is not the bequest which is rendered void, but it is the condition itself, which becomes void when its performance is impossible (1).

§ 7. The same as to conditions subsequent.—In regard to conditions subsequent, the law in England always leans against the restrictions which these conditions impose, and construes them with rigid strictness and affords protection against such conditions divesting an estate or gift already vested, except in cases where the very event happens or the act in all its details is performed in order to deprive the legatee of his legacy (3). But the case is otherwise where there is what is called a "gift over," that is, to another person if the condition be not complied with, for that would be taking over from the legatee the gift which, by the testator's express direction, had vested in him. Where, for instance, A. bequeathed to his daughter B. a legacy, on condition that

(1) Page: § 679.

(2) Wms. 1269, 1270, 1271; Theob. 492-93, 541, 543, 5th Edn.; Shep. T. 133; 2 Jarm. 12, 4th Edn.

(3) Wms. 1278; Shep. T. 133.

if she married without her mother's consent, then a part of the legacy would go over to her brother ; B married without her mother's consent ; it was held by the Court of Chancery that the part of the legacy must be given up. "This," the Court said, "is not to be as a clause *in terrorem* (1) only, but the sum upon her marrying is well devised over, and an interest vested in the brother" [*Stratton v. Grymes*, 2 Vern. 357] (2). Thus it will be seen that where there is a "gift over," the Court will not lend its aid in defeating an estate which has already vested, as it would otherwise do. So the result is, that according to the law in England, the validity of conditions subsequent depends upon their being accompanied by a "gift over."

§ 8. Difference between English law and Indian law.—It appears to be clear, therefore, that so far as conditions precedent are concerned, the law here is substantially the same as in England. In regard to conditions subsequent, however, there is this difference that in England the validity of such conditions depend upon their being accompanied by a "gift over," but in this country and under this Act, such conditions are valid even without a "gift over" (see the observations of the Law Commissioners, *supra*).

§ 9. Conditions Valid or Invalid.—"As to what conditions are valid, it has been said that nothing can be made the subject of a condition in a will, which could not be made the subject of a contract or wager in life" [*Egerton v. Earl of Brownlow*, 4 H. L. ca. 1] (3). As to all conditions the maxim is *cujus est dare ejus est disponere*, that is, the bestower of a gift has a right to regulate its disposal. In other words, "when a man hath a thing he may condition with it as he will ;" so that, he may make any disposition of his property and qualify such disposition as it may please himself. But this general principle is subject to this qualification that the disposition must be consistent with the rules of law, and not repugnant to the grant or to the estate. For "no man," says Lord St. Leonards, "can attach any condition to his property which is against the public good," nor can he "alter the usual line of descent by a creation of his own." Thus where one of the limitations was to Lord Alford * * with a proviso that if Lord Alford should die without having acquired the title of Duke or Marquis of Bridgwater, then the estate to the heirs male of his body was to cease and be absolutely void ; and Lord Alford entered into possession of the estates which were worth £70,000 a year—but died without acquiring any of the higher titles. It was held that his heir male was entitled to the estates discharged of the condition subsequent, for it was void as being contrary to public policy. The ground of the decision was that the condition tended to induce the donee of the estate to use improper means to influence the Crown, and the Crown itself to confer a particular title on a particular person, thus fettering its discretion as the fountain of honour [*Egerton v. Brownlow*, *supra*] (4).

§ 10. Condition against public good.—So where a testator bequeathed certain properties to H. B. and his assigns for life, and then imposed a condition restraining him from entering into the military services of the country, with the direction that "if the said H. B. shall enter into the naval or military services of the country * * * then I give and devise my said freehold to F. B. in fee simple"; it was held, the condition was void, being against public policy. But it was pointed out by Mr. Justice Swinfen Eady, who delivered judgment

(1) See sec. 121 (S) *post*.

(2) Flood. 439.

(3) Theob. 583, 5th Edn.

(4) See Shep. Touch. 119 ; Broom. L. Max. 459.

in the case, that great caution is necessary in considering whether a certain contract or stipulation is void on account of being contrary to public policy or public good: for, "At different times very different views have been entertained as to what is injurious to the public" [*Beard v. Hall* (1908) 1 Ch. 383]. In fact, "public policy does not admit of definition and is not easily explained. It is a variable quantity; it must vary and does vary with the habits, capacities and opportunities of the public" [Kekewich, J. in *Davies v. Davies* (1887) L. R. 36 C. D. 369]. Thus, as held in *Janson v. Driefontein Consolidated Mines, Ltd.* [(1902) A. C. 484 at 500] "public policy is always an unsafe and treacherous ground for legal decision." See *Gangu v. Chandrabhagabai* [(1907) 32 B. 275 at 295] where that case was referred to.

11. Condition that legatee or devisee shall reform his character and lead a moral life.—Such conditions are valid. In *Tattersal v. Howell* [2 Mer. 26] a legacy was given on condition that the legatee changed his course of life and gave up all low company and frequenting public houses. It was held the condition was valid. [So held in the American Courts. See *Cassem v. Kennedy*, 147 Ill. 660; *Hawke v. Euyart*, 27 Am. St. Rep. 149. But see *Maud v. Maud*, 27 Beav. 615]. But such conditions are very strictly construed. Where, for instance, there was a gift over, if the devisee became a vagabond and drunkard, it was held, the fact that he became a drunkard and not a vagabond, was not sufficient [*Forsyth v. Forsyth*, 46 N. J. Eq. 400]. See *supra*, § 5, Ex. (2) and (3).

§ 12. Condition as to religion.—A gift over in the event of a change of religion by the legatee is valid [*Hodgson v. Halford*, 11 Ch. D. 959; but see *In re Thompson: Griffith v. Thompson*, 44 W. R. (Eng) 582]. Generally speaking, such conditions are valid (1). In some jurisdictions, however, they are held to be contrary to public policy, as interfering with the liberty of conscience (2).

§ 13. Condition of devisee being an adopted son.—Bequests made on condition of the legatee or devisee standing in a certain relation to the testator or some other person, are conditional bequests. Cases of bequests therefore, to adopted sons in their capacity as such sons, are conditional bequests, and the question often arises, whether the legality of such sons is the condition of the gift or whether the person designated is intended to take independent of a legal adoption. The question is one of construction only and often involves considerable difficulty. Mr. Page says: "It is often difficult to determine whether a declaration that a certain devise was on account of something to be done by the devisee before the death of the testator or before the time of the vesting of the estate, is a condition, or merely a declaration of the motive which leads the testator to bestow the gift" (5). See *ante*, sec. 63 (S), §§ 9 and 10, pp. 220-223,

Bequest upon impossible condition.

54. [113 (S)].—A bequest upon an impossible condition is void.

(1) *Rood v. Geo.*

(2) *Page v. Geo.*

Illustrations.

(a) An estate is bequeathed to A on condition that he shall walk one hundred miles in an hour. The bequest is void.

(b) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Impossible condition.*

§ 3. *Where condition subsequent.*

Extent of the section.

This section is extended to the Hindus, Jains, Sikhs and Buddhists.

§ 1. *The section.*—This section and the next following section, correspond to section 25 of The Transfer of Property Act (a) (Act IV of 1882).

The condition referred to in this section is condition precedent, that is, "such as must happen or be performed before the estate can vest" (1). If, therefore, the happening or fulfilment of the condition is impossible, the bequest or gift must fail, because such bequest or gift depending upon the performance of the condition, non-performance of it will necessarily defeat it. So the proposition is, where there is no performance there is no gift.

§ 2. *Impossible condition.*—According to the Common law of England, a condition is considered as impossible only when it cannot by any human means, take effect. But if it be only in a high degree improbable, and such as it is beyond the power of the obligee to effect, it is then not deemed impossible (2).

It has been decided in England that if the impossibility of the condition arise from the subsequent act of the testator, the condition will be discharged and the gift freed from it, both as regards realty and personalty, on the ground that the testator cannot, merely by his own act, prevent the estate from vesting [*Darley v. Langworthy*, 3 Bro. C. C., 359]. But where the condition is precedent, though in fact impossible at the date of the will, or becoming impossible by subsequent events involves no physical impossibility, the legacy will be void and fail to take effect [*Lowther v. Cavendish*, 1 Ed 99, 116] (3).

§ 3. *Where condition subsequent.*—If the condition subsequent is impossible, the condition is void and the legacy absolute, according to Common law as well as Civil law [*Thomas v. Howell*, 1 Salk. 170; *Walker v. Walker*, 2 DeG. F. and J. 255; Cf. *Re Croxon* (1904) 1 Ch. 252]; and if the performance of the condition subsequent be rendered impossible by the act of God, still the bequest will be good being freed from the condition [*Collen*].

(a) An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

(1) 1 Steph. 309, 8th Edn.

(2) Story. Eq. Jur. § 1305.

(3) Theob. 493, 5th Edn.; Shep. T. 133.

v. *Collett*, 35 Beav. 312; *Re Greenwood* (1903) 1 Ch. 749]. In either case it is the *condition* which is void or a nullity and not the legacy.

Here the distinction between a condition precedent and subsequent, is very marked. If the condition is precedent, its impossibility or illegality, destroys the legacy which can never take effect; but if it is subsequent its impossibility or illegality, destroys the very condition and the legacy becomes good, valid and absolute.

As to the distinction between a bequest imposing an obligation, or what is called onerous, and a conditional bequest, see *supra* sec. 109 (S), § 2.

55. [114 (S)].—A bequest upon a condition, the fulfilment of which would be contrary to law or to morality is void.

Bequest upon illegal or immoral condition.

Illustrations.

(a) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(b) A bequeaths 5000 rupees to his niece if she will desert her husband. The bequest is void.

NOTES AND COMMENTARIES.

§ 1. *The law in England.*

§ 3. *Illustration (b).*

§ 2. *The section.*

Extent of the section.

This section has been incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. The law in England.—The English law on this subject may be stated thus :—"With regard to conditions precedent which are illegal, if performance requires an act which is *malum in se*, as to kill A., burn his house, or the like, then both by the Common and Civil law, not only the condition but the bequest itself is void. But where the illegality consists merely in the performance of the condition being against a rule or the policy of the law, there (although by the Common law the devise as well as the condition is equally void as if there existed *malum in se*), by the Civil law, the condition only is void, and the bequest single and good" (1). Where the performance of a condition subsequent is illegal, both by the Common law as well as the Civil law, the condition only is void and the bequest freed from it as if it has been given unconditionally (1). So where the condition is too uncertain [*Claverling v. Ellison*, 7 H. L. C., 707].

§ 2. **The section.**—This section (2) recognizes no distinction between *mala in se* (acts which are wrong in themselves, whether prohibited by human laws or not) and *mala prohibita* (acts prohibited by human laws). Under this section any bequest upon a condition, the fulfilment of which would be contrary to law or morality, is void. Thus a bequest, made conditional on the continuance of immoral relations between the testator and the legatee, was held to be void [*Tayaramma v. Sitaramasami Naidu*, I. L. R. 23 M., 613; 10 M. L. J. 214].

But a gift made by one to his mistress who lived with him as his wife, on condition of her continuing to be his wife and remaining obedient to him, her husband, was up-held as valid [*Ram Sarup v. Bela*, I. L. R. 6 A., 313 P. C.; see *Lachmi Narain v. Wilayti Begum*, I. L. R. 2 A., 433]. The reason for upholding the gift is explained by their Lordships in these terms: “—in making this bequest to her, he regarded her in the light of a wife and the mother of his children, and it appears to us that the consideration he had in mind in making the gift may be held to have been rather her continuing to remain and discharge her duties to the children she had by him, than the continuance of their illicit intercourse, for it must be remembered he considered his state of health at the time to be precarious, and a personal object does not appear to have actuated him” [*Lachmi Narain v. Wilayti Begum*, *supra*].

§ 3. **Illustration (b).**—This is in accordance with *Wren v. Bradley* (De G. and Sm. 49), where it is laid down that in personalty a condition precedent which is *contra bonos mores* (against good morals) is void and may be rejected leaving the gift absolute. In that case the gift was an allowance to a married woman, on condition that she lived apart from her husband, and the condition was void, but not the bequest (3). Under this section, however, the bequest which is void and not the condition.

§ 4. **Contrary to law or morality.**—A testator bequeathing certain property to his daughter's children imposed a condition in these terms: “if at any time or times my said daughter and her said husband shall be living separately and apart from each other, then, and in such case such child or children only of the said marriage who being under the age of 21 years shall permanently reside with or be under the sole control of my said daughter during such time or times as my said daughter and her said husband shall be so living separately, ...”. It was held, such condition was against public policy and therefore invalid, and the children were entitled to the legacy. Mr. Justice Warrington in delivering the judgment of the Court referred to the following observations of Lord Macclesfield in *Mitchell v. Reynolds* [(1711) 1 Pm. Williams, 181]:—“All the instances of conditions against Law in a proper sense are reducible under one of these heads: First, either to do something that is *malum in se*, or *malum prohibitum*; Secondly, to omit the doing of something that is a duty; thirdly, to encourage such crimes and omissions. Such conditions as these the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes.” [*In re Morgain*; *Dawson v. Davy* (1910) 14 C. W. N. clxxv.] See *Beard v. Hall*, *supra*, Intro. notes, § 10.

(1) *Ibid.* 1271.

(2) Rather the Indian Legislature.

(3) 2 Jarm. 13, 4th Edn.; Wms. 1270; Hend. T. S. 119, 2nd Edn.; Theob. 375, 3rd Edn.; 493, 5th Edn.

This case is distinguishable from the cases under this section and the last preceding section, in that in the former the condition itself is invalid and the bequest being freed from it, is good; but in the latter, it is not the condition that is void but the whole bequest is void and incapable of taking effect.

56. [115 (S)]. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Fulfillment of condition precedent to the vesting of a legacy.

Illustrations.

(a) A legacy is bequeathed to A. on condition that he shall marry with the consent of B, C, D, and E. A marries with the written consent of B. C. is present at the marriage. C sends a present to A. previous to the marriage. E has been personally informed by A of his intentions and has made no objection. A has fulfilled the condition.

(b) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(c) A legacy is bequeathed to A. on condition that he shall marry with the consent of B, C, and D. A marries in the lifetime of B, C, and D, with the consent of B and C only. A has not fulfilled the condition.

(d) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, and D. A obtains the unconditional assent of B, C, and D. to his marriage with E. B, C, and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(e) A legacy is bequeathed to A. on condition that he shall marry with the consent of B, C, and D. A marries without the consent of B, C, and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(f) A makes his will, whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(g) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.

NOTES AND COMMENTARIES.

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| 1. The section. | § 4. Illustrations. |
| 2. Condition in restraint of marriage. | § 5. Consent how construed. |
| 3. Consent. | § 6. Non-fulfilment. |
| § 7. Substantial compliance. | |

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees. It has not been extended to the Talukdars of Oudh.

1. The section.—This section treats of performance of conditions precedent. It matters not how *unreasonable* the condition precedent may be, provided it is not impossible in itself, illegal, or *contra bonos mores* (against good

morals), i.e., "not inconsistent with law or morality," and can be performed by the person upon whom that duty is cast. And although the general rule is, that they must be strictly performed, yet by the Civil law, which has been in this respect adopted by the Courts of Equity and the Indian Legislature (1), if the condition is performed *cypres* (i.e., "as near the intent as circumstances permit") (2) as it is termed, that is, so as *substantially* to fulfill the testator's intention, it will be sufficient (3) [see sec. 119 (S) *infra*, §§ 1, 2]. The maxim is, *cujus est dare ejus est disponere* (whose is to give, his is to dispose, i.e., the bestower of a gift has a right to regulate its disposal) and equity cannot relieve against it [*Bertie v. Falkland*, 2 Vern. 338] (4).

§ 2. Condition in restraint of marriage.—As regards conditions in restraint of marriage, which seem largely to come within the operation of this section, it seems to be now settled, that although conditions in absolute restraint of marriage are not allowable, "conditions which do not directly or indirectly import an *absolute injunction to celibacy*, are valid" [*Scott v. Tyler*, 1 Dick. 721, S. C. 2 W. & T. L. C. 115]. Mr. Justice Story says: "conditions annexed to gifts, legacies and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void [citing *Scott v. Tyler, supra*]. And so, if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate, is unreasonably restrained in the choice of marriage, it will fall under the like consideration." Such restraints are reasonable when they "tend to protect the individual from those melancholy consequences to which an overhasty, rash or precipitate match would probably lead." Thus conditions restraining marriage under 21, or other reasonable age, without consent of executors, guardians, &c., or requiring or prohibiting marriage with particular persons, and the like, are valid and legal conditions (5).

§ 3. Consent.—In regard to conditions requiring marriage with consent, the general rule is, that in cases where the consent of executors or trustees is required, such consent must be obtained before or at the time of marriage; for a subsequent approbation by the executors, &c., will not amount to a performance of the condition [*Reynish v. Martin*, 3 Atk. 331; *Clarke v. Parker*, 19 Ves. 21]. See illus. (e). A general consent, however, given to the legatee at his majority is sufficient. Thus, where a general permission was given to the legatee to marry according to her discretion, it was held that such permission, without any further consent was sufficient [*Pollock v. Croft*, 1 Mer. 181; *Mercer v. Hall*, 4 Bro. C. C. 328] (6). It appears, in such cases subsequent approbation would also be sufficient, unless the consent were required to be in writing [see *Pollock v. Croft, supra*] (7).

Conditions requiring consent in marriage is satisfied when it is applied to the first marriage only. The condition does not apply to a subsequent

(1) *Stokes*, 96.

(2) See sec. 101 (S).

(3) *Shep. T.* 134; *Wms.* 1273.

(4) *Flood*, 437.

(5) *Wms.* 1281; *Story*, Eq. Jur. §§ 280, 281; 2 *Jarm.* 44, 45, 4th Edn.; *Theob.* 544-46, 5th Edn.; *Shep. T.* 132.

(6) *Wms.* 1281, 1284; 2 *Jarm.* 53, 55, 4th Edn.

(7) *Hend. T.* 122, 2nd Edn.

marriage [*Hutchison v. Hammond*, 3 Bro. C. C. 128. But see *Randall v. Payne*, 1 Bro. C. C. 55] (1).

As to where the consent is required to be in writing, it seems, the law is not very clear. In *Strange v. Smith* (Amb. 263), Lord Hardwicke held, that the mother, whose consent in writing was required, had, by making the offer to, and permitting the addresses of the intended husband, given consent to her daughter's marriage, though there appears to have been no written consent. So in *Worthington v. Evans* (1 S. and St. 105), Sir John Leach thought that the accidental omission of a trustee, who approved the marriage, to give a consent in writing, would not invalidate it (2). Thus it seems to have been held that where a consent in writing is prescribed, an oral consent would be sufficient [*Scott v. Tyler*, 2 W. & T. L. C. 115] (3). This is illustrative of the principle that, if what is required has been substantially done, it is immaterial that it was not done exactly in the manner prescribed.

In the case of a condition requiring the consent of several persons, if the consent required is that of executors or trustees, the consent of those who renounce or do not act is not necessary [*Worthington v. Evans*, *supra*; but see *Clarke v. Parker*, 19 Ves. 1]. But if there is only a single executor who renounces, his consent must be obtained [see *Graydon v. Hicks*, 2 Atk. 16. The point is doubtful]. It seems to be established, however, that a condition requiring the consent of several persons is performed by obtaining the consent of the survivors [*Worthington v. Evans*, *supra*; *Ewing v. Anderson*, 7 W. R. Eng. 23; *Dawson v. Oliver Massey*, L. R. 2 Ch. D. 753]. As a general rule, where the consent of several persons is required, all must concur [*Clarke v. Parker*, *supra*] (4). See illus. (b) & (c).

If the consent of guardians is required, guardians must be appointed if there are none [*In re Brown's Trusts*, L. R. 18 Ch. D. 61] (5).

Consent of trustees may be presumed from the non-expression of their dissent, according to the maxim *qui tacet consentire videtur* (he who is silent appears to consent), specially where express assent is withheld fraudulently [*Berkley v. Ryder*, 2 Ves. 533]; and similarly, in the absence of direct evidence, consent will be presumed from the absence, for a long time, of any objection to the legatee's title after forfeiture [*In re Birch*, 17 Beav. 358] (6). See illus. (a).

§ 4. Illustrations.—On the same principle, the consent may be implied as in illustration (a) from the circumstance that the executor or trustee witnessed the reception of addresses of marriage, and intimated no disapprobation.

Here also the said maxim applies [*Campbell v. Lord Netherville*, cited in 2 Ves. Sen. 530] (7).

This is in accordance with *Strange v. Smith* (Amb. 263), where it is laid down that an unconditional consent, with a knowledge of the circumstances, once given, cannot be retracted, unless for very good reasons (8).

(1) Wms. 1285; Theob. 494, 5th Edn.; 2 Jarm. 3, 44, 4th Edn.

(2) 2 Jarm. 52, 4th Edn.

(3) Brown and Shep. Act IV, 1882, 78; Haynes. L. C. 239.

(4) Wms. 1284; Theob. 495, 5th Edn.; 2 Jarm. 54, 55.

(5) Wms. 1284; Theob. 495, 5th Edn.

(6) 2 Jarm. 52, 4th Edn.

(7) Wms. 1285.

(8) Wms. 1284.

This illustration is taken, from *Clarke v. Berkeley*, (2 Vern. 720) where it was held that if the legatee marries in the lifetime of

Illus. (f) the testator with his consent, or subsequent approbation, that is equivalent to a marriage after his death with the consent of his executors (1) (a).

By English Law, if the document mentioned in this illustration is in fact executed within a reasonable time, though not within the

Illus. (g) specified time, the legatee will be entitled on the principle that the period for executing the document was merely ancillary to the accomplishment of that object, and the procurement of the instrument was the end and substance of the condition [*Taylor v. Popham*, 1 Bro. C. C. 168] (2) (a).

§ 5. Consent how construed.—As a general rule, expressions of consent are to be construed liberally, especially, if those whose consent is required, have sanctioned, by their acquiescence, the growth of an attachment between the parties [*D'Aguiar v. Drinkwater*, 2 V. & B. 225].

§ 6. Non-fulfilment.—See sec. 119 (S), *infra*.

Where a testatrix gave Mrs. W. an annuity to bring up a child, and at the child's death to Mrs. W. herself, and Mrs. W., on the death of the testatrix, declined to take charge of the child, and the child was placed under the care of another person, and died; it was held that, here there was a condition precedent to the gift, and that as Mrs. W. had refused to perform the condition, she was not entitled to the gift [*Pitt v. Pitt*, 18 W. R. No. of Eng. Ca. 3].

§ 7. Substantial compliance.—"Where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called *cy pres* (3). So a condition that the devisee shall learn some useful "trade" is satisfied by any special occupation, such as type writing or school teachership." [*Colly v. Dean* (1901) 70 N. H. 591; 49 Atl. 574].

(a) **Illus. (f) & (g).**—It is not clear why the consent of A's executor in illus. (f) is equivalent to A's own consent. and such consent, though given after the marriage amounted to a *substantial compliance*; while on the other hand, where there is a specified time in the will prescribed for the performance of a condition (Illus. (g)), *reasonable time* is of no avail for such performance, although according to English law such time would be sufficient, the specified time being only ancillary to the accomplishment of the object.

Sir Whitley Stokes is of opinion that illus. (g) is an example of "giving effect to the plain meaning of the words of the testator," which the Legislature consider so desirable. This is quite true: but yet, it seems to be very hard that where the time specified in the will is 4 days and the legatee fulfils the condition within 3 days, this should not be regarded as *substantial compliance*, according to the very proposition of law laid down in this section. Why again, if the plain meaning is to be adhered to in all cases it should have no application in the case of illustration (f)? Indeed, it stands to reason that, if this section is to be regarded as an exception to the general rule indicated by the "plain meaning, &c.," it is unlikely that there should be an exception to the exception, as illustration (g) is supposed to be. May it not be submitted, therefore, that, that illustration is under such circumstances, either misleading or anomalous?

(1) Wms. 1285; Theob. 494, 5th Edn.

(2) Wms. 1273.

(3) Story Eq. Jur. § 291.

57. [116 (S)].—Where there is a bequest to one person and a bequest of the same thing to another, and if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Bequest to A., and on failure of the prior bequest, to B.

Illustrations.

(a) A bequeaths a sum of money to his own children surviving him, and if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.

(b) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *The illustrations.*

§ 3. *Another principle.*

§ 4. *The principle followed in India.*

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees.

§ 1. The section.—This, and the next following section, prescribe rules for the determination of cases where apparent conditions precedent should be regarded as conditional limitations, and construed according to their *substantial effect*. Sir E. V. Williams explains the principle in the following words:—"Instances have frequently occurred in which the Court has concluded, from the context of the will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition as a clause of *conditional limitation* (a), so as not to require, as in the case of a gift on a condition, that the

(a) A conditional limitation may be described "as a qualification annexed to the grant of an estate and providing for its termination, or for its abridgement by operation of law, upon the occurrence of some event which may or may not happen, and which, if it happen, must precede the occurrence of the event upon which the estate would expire if it had been given unconditionally" (1).

In a gift to A. and his heirs, the word "heirs" marks out or limits the estate, that is, measures the duration or quantity of the estate. Here the word "heirs" is a word of limitation. [See sec. 82 (S), f. n.]

So where the gift is to A *so long as* he continues unmarried, or *until* out of the rents and profits he shall have made 500 Rupees, the clause "*so long as* he &c.," or "*until* out of &c." is regarded as a clause imposing a condition only. But if the words of condition are followed by a gift over, as where the gift is, "to A, *so long as* he continues unmarried, but if married, then to B.," the clause "*so long as* he continues unmarried" will be converted into a clause of conditional limitation (2).

(1) Edw. L. of Pro. 46, 47; 1 Steph. 295-96.

(2) Wms. R. P. 145-147; Edw. L. of Pro. 147-49; T. L. Lect. 1886, by Chatterjee. 293, 204; Theob. 491, 5th Edn.

very event, on which the gift is made contingent, must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified, and so the real intent of the testator."—"In general, where there is a subsequent limitation, limited to take effect on the failure of a preceding one, if the preceding limitation is renewed, or does not arise, the subsequent limitation will take effect"(1); that is, "if, in any event, the first limitation cannot take place, the subsequent one shall" [*In re Sheppard's Trust*, 1 Kay and J. 269](2).

§ 2. The illustrations.—Where the gift was to the testator's children surviving him, and if they all died under 21 (or 18, as in illustration (a)), then over, *i.e.*, to B., and the testator died without ever having had a child, the bequest over was held good [*Murray v. Jones*, 2 V. and B. 313; *Meadows v. Parry*, 1 V. and B. 124]. Here the clause "and if they all died under 21" is regarded as a clause of conditional limitation, so that, the preceding limitation not arising, the subsequent limitation, *i.e.*, the gift over, takes effect. So where a testator devised to the child of which his wife was pregnant, and if

There is considerable resemblance as well as difference between conditional limitations and estates depending on condition subsequent. The difference consists in this: that in conditional limitations "the estate determines as soon as the contingency happens; and the estate in remainder, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy;" but in estates depending on condition subsequent, the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition and avoid the estate by asserting their rights, or by entry (3). Further, in a condition subsequent, the condition is something superadded to the limitation, but in a conditional limitation, the condition is not superadded, but is itself a part of the limitation. Thus a grant to A. for life, but if B. should return from England then the grantor to re-enter and determine the grant, is a grant subject to a condition subsequent; but a grant to the use A. until B. returns from England, and then to C. in fee, would be a conditional limitation, though A. would take practically the same interest.

It will thus appear that the distinction between a conditional limitation and a condition is in the form of words only.

Words expressive of condition subsequent are—"if," "upon condition that," "provided that," &c.; and words expressive of conditional limitation are, "until," "while," "so long as," &c.

"It is often difficult to determine in particular cases whether the expression used is a condition subsequent or a conditional limitation, and the Courts incline to resolve the doubt in favour of its being a condition. If the gift is during widowhood, until marriage, so long as she remains single while sole, or the like, there are no words to carry the enjoyment beyond the time mentioned; which is, therefore, of necessity held to be a conditional limitation, and not a condition subsequent, because it cannot be a condition subsequent unless it might cut off the estate before its natural termination. Moreover, if there is a gift over on the happening of the event to some one else, it is always held to be a limitation rather than a condition regardless of the form of expression used; and the reason given is that no one but the grantor or his heirs can make entry to terminate the estate for breach of the condition, which is a technical rule arising out of the feudal doctrines; wherefore, if it were held to be a condition it could have no effect, for the heir would have no interest to make entry, and breach of the condition does not terminate the estate till entry is made. But if words of condition are used without gift over, or even if the form of expression is equivocal it may be held to be a condition subsequent"(4).

The words "conditional limitation" are used by different writers in different senses (5).

(1) Wms. 1274-75; Hend. 258.

(2) Wms. 1276.

(3) 1 Steph. 295, 2 Black. 132.

(4) Rood, § 600, p. 406.

(5) 1 Steph. 295, f. n.

any such child died under 21, then over; the devise over was held good, though the wife was proved not to have been *enceinte* [*Jones v. Westcombe*, 1 Eq. Abr. 245]. Similarly, in illustration (b), which is in accordance with *Avelyn v. Ward* [1 Ves. Sen. 420], the legatee dying in the testator's lifetime, the preceding limitation did not arise, and it was held that this was a *conditional limitation*, and not a case of condition, and that the gift over accordingly took effect,—Lord Hardwicke observing, “if the precedent limitation by what means soever is out of the case, the subsequent limitation takes effect” [in *Avelyn v. Ward*, *supra*] (1).

If illustration (b) be compared with illustration (g) in the last preceding section, it will appear that, in both the cases represented by these illustrations, the bequest is made subject to the condition that the legatee shall execute certain document within a certain specified time. In illustration (g) the condition is precedent and is required to be literally complied with, its performance within a *reasonable* time not being sufficient, although according to English law such performance is sufficient when there is no gift over. This shows that a condition requiring a thing to be done within a given time, without a gift over, under this Act, is equivalent to such a condition with a gift over, under the law in England. (See the observations of the Law Commissioners) (2). But in illustration (b) the condition is subsequent with a gift over. This is not, properly speaking, a condition, but a *conditional limitation* under this section, and it is governed by a different principle as noted above (3).

§ 3. **Another principle.**—It seems the cases under this section may be explained on another principle, which is thus laid down by Mr. Theobald: “Where the events which happen include the events contemplated by the testator, so that it may be said, if the gift was to go over in the events mentioned, *a fortiori* it must have been meant to go over in the events that have happened, the gift over will take effect.” In such cases the preceding estate, as for instance, the estate of B. in the illustration (b), “being out of the way, the remainder takes effect [see *Jones v. Westcombe*, *supra*; *Avelyn v. Ward*, *supra*; *Meadows v. Parry*, 1 V. and B. 124] (4). In these cases the failure of the prior gift “was not owing merely to the fact that the first taker did not survive the testator, * * * but to that fact, *plus* the non-performance of the condition, since, if the first taker had survived the testator he would not have taken an indefeasible interest till the condition had been satisfied” (5).

On the same principle, if the prior gift is to a class, as where there is a gift to children as a class, followed by a gift over, if they die under 21, and if the contemplated class never comes into existence, the gift over takes effect. Thus in *Mackinnon v. Sewell* [5 Sim. 78; 2 M. and K. 202], where there was a bequest to A for life, with ultimate remainder to the children of A living at her decease, to be paid to them after her death as they attained 21, and *if all died before attaining 21*, then over; and one child of A attained 21, but no child survived her, it was held that the gift over took effect (6).

(1) Wms. 1274-75; Theob. 572, 5th Edn.

(2) Sec. 113 (S) *supra*, Intro. notes.

(3) See Wms. 1273-74; 2 Jarm. 828—31 4th Edn.

(4) Theob. 572, 5th Edn.

(5) Theob. 448, 3rd Edn.

(6) Wms. 1276; Theob. 574, 5th Edn.

It will appear from the foregoing that the principle established in the cases of *Jones v. Westcomb*, *supra*; *Meadows v. Parry*, *supra*; *Murray v. Jones*, *supra*; *Mackinnon v. Sewell*, *supra* and *Avelyn v. Ward*, *supra*, has been codified in this section. This view is supported by *Radha Prasad Mullick v. Ranimony Dasi* and *Peary Lall Mullick v. Ranimoni Dasi* [3 Cal. L. J. 502; 10 C. W. N. 695; I. L. R. 33 C. 947].

Cases codified.

If the prior bequest fails *ab initio*, as where the gift to the testator's adopted son fails the power to adopt given by the will being invalid, the case will be governed by this section and the subsequent bequest will take effect [*Radha Prasad Mullick v. Ranimoni Dasi*, *supra*]. See *ante* sec. 111 (S), § 1.

§ 4. The principle followed in India.

This section has been applied in the case of *Okhoymoney Dasee v. Nilmoney Mullick* [I. L. R. 15 C., 282]. In that case the testator, after appointing his brother N. his sole executor, provided—"my wife is supposed to be in the family way; should she bring forth a male, in that case he will be the sole heir of my property and effects on his attaining proper age. * * * In case my son dies before attaining proper age, all my estate and property should be taken possession of by my brother." The child with which the widow was *enceinte* turned out to be a daughter, and it was held, following *Jones v. Westcombe* [*supra*], that the gift over to the brother took effect. So, where the testator directed his properties to be made over to his daughters "in case none of such adopted sons survive my said wife * * *," and the adoption failed the authority to adopted given by the will being invalid, it was held, that there was a valid gift over to the daughters [*Raneemoni Dasee v. Premmony Dasee*, 9 C. W. N. 1033; *Radha Prasad Mullick v. Ranimoni Dasee* and *Peary Lall Mullick v. Ranimoni Dasee*, 10 C. W. N. 695; 3 Cal. L. J. 502; I. L. R. 33 C., 947; S. C. 12 C. W. N. 729, P. C.; 8 C. L. J. 48, P. C.; 5 All. L. J. 460; 10 Bomb. L. R. 604; I. L. R. 35 C., 896; 18 M. L. J. 287; L. R. 35 I. A. 118].

58. [117 (S)].—Where the will shows an intention that

Case in which the second bequest shall not take effect on failure of the first.

the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner.

Illustration.

A makes a bequest to his wife, but in case she would die in his lifetime, bequeaths to B. that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The bequest to B. does not take effect.

§ 1. The section.—"Again," says Sir E. V. Williams, referring to the cases noted under section 116, (§ § 2 & 3) "it must not be understood with regard

to cases such as these, that if from any cause whatever, the prior gift cannot take effect, the second or alternative gift is for this reason to become operative ; for it would be making, not construing the testator's will, if this were to be allowed in any event not expressly or impliedly indicated by the language used by him." Accordingly, where there was a bequest to the testator's wife absolutely, and in case of her death in his lifetime, over, and he and she both perished at sea, under circumstances which made it impossible to prove that the wife died before the testator, it was held by Romilly, M. R., and by Lord Cranworth, on appeal, that the gift over failed ; because "it was made dependent on an event which had not been proved to have happened, *viz.*, the testator surviving his wife ; and that it did not become operative from the mere fact of the gift to the wife failing to have practical operation ; for the testator had indicated no such intention, either expressly or impliedly." In the course of his judgment Lord Cranworth said : "If the grantor had in his mind the extremely improbable event which occurred, and desired B. (see illustration) still to take the property, he would not have relied on the words actually used, but he would have made express provision to accomplish his object" [*Underwood v Wing*, 4 De. Gex. M. and G. 633 ; *Wing v. Angrove*, 8 H. L. 183 ; *Elliott v. Smith*, L. R. 22 Ch. D. 236] (1).

Referring to the last mentioned cases, Mr. Theobald says : "There are here two distinct and independent events, in which the gift to A (the wife) will lapse, death in the testator's lifetime and death simultaneously with the testator, one of which the testator has contemplated and the other not. No doubt it may be said, that the gift over might be read as equivalent to "if A does not survive me to B"; but this would be making a will for the testator, since the event that has happened does not include the event contemplated [*ante* 116 (S) § 3] and it cannot be said, that if the gift over was to have effect if A (the wife) died in the testator's lifetime, *a fortiori* it was to have effect if A (the wife) died simultaneously with the testator" (2).

This section qualifies, to some extent, the rule in the last preceding section [116 (S)]. See *Radha Prasada Mullick v. Ranimoni Dasi*, [3 C L. J. 502, 511 ; 10 C. W. N. 695 ; I. L. R. 33 C., 947].

59. [118 (S)].—A bequest may be made to any person

Bequest over, conditional upon the happening or not happening of a specified uncertain event.

with the condition superadded that in case a specified uncertain event shall happen the thing bequeathed shall go to another person, or that in case a specified uncertain event

shall not happen the thing bequeathed shall go over to another person.

In each case the ulterior bequest is subject to the rules contained in sections 107, 108, 109, 110, 111, 112, 113, 114, 116, 117.

(1) Theob. 571, 5th Edn.; Wms. 1277-78.

(2) Theob. 447, 3rd Edn.; 571, 5th Edn.

Illustrations.

(a) A sum of money is bequeathed to A, to be paid to him at the age of 18, and, if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A shall die under 18.

(b) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.

(c) A sum of money is bequeathed to A for life, and after his death to B.; but if B. shall then be dead, leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy, subject to be divested if he dies leaving a son in A's lifetime.

(d) A sum of money is bequeathed to A. and B., and if either should die during the life of C., then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money, and the representative of B takes the other half.

(e) A bequeaths to B. the interest of a fund for life, and directs the fund to be divided, at her death, equally among her three children, or such of them as shall be living at her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *The leaning of English law.*

§ 3. *The leaning of Hindu law.*

§ 4. *Condition not to dispute the will.*

[illus. (b)].

§ 5. *Validity of such condition.*

§ 6. *Effect of success in the dispute.*

Extent of the section.

This section is extended to the Hindus, &c.

§ 1. **The section.**—This section corresponds to section 28 (a) of Act IV of 1882 (Transfer of Property Act). The conditions contemplated by this section are in the nature of conditions subsequent, the object of such conditions being to control and alter the interest or the order of limitation originally prescribed; they do not effect the vesting of estates, but, on nonfulfilment, may operate to divest estates which have already vested. It is to be remembered, however, that an estate which has already vested cannot be divested unless all the events happen. For, "As a devise expressly made to take effect on a contingency will not arise unless such contingency happens, it follows *a fortiori* that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise, happen" (1).

The ulterior bequest is not made subject to section 115 (S), because of the provisions of section 119 (S), *post*.

(a) On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-seven.

(1) 1 Jarm. 827, 4th Edn.

This section and the following four sections deal with the divesting of bequests.

§ 2. The leaning of English law.—The law in England, as it has already appeared, always leans against the restrictions which these conditions impose, and construe them with rigid strictness, as they go to divest estates already vested. Hence, “the very event must happen, or the act with all its details must be done, in order to deprive the legatee of his legacy” (1). Thus, where there was a bequest to A. of the interests and dividends of personal property for life, and then to be divided equally amongst her three children, *or such of them as should be living at her death*; and the children *all* died in the lifetime of the tenant for life; it was held that the bequest over indicated by the words “or such of them, &c.,” did not take effect, and that the children took vested interests which passed to their representatives. Here “the vested interests first given by the will were, by the form of the expression, only defeated in case there should be some or one, and not all, of the children living at the mother’s death. but that event did not happen, for there was not one child then living” [*Sturges v. Pearson*, 4 Madd. 411] (2). That is to say, if some or one of the children were living at the mother’s death, the interests of those who died would have gone over to them instead of to their representatives, as the case actually happened; in other words, the gift over, which depended upon some or one living at the mother’s death, would have taken effect [see *Wing v. Angrove*, 8 H. L. 183; *Elliott v. Smith*, L. R. 22 Ch. D. 236] (3). See illustration (c).

In *Harrison v. Foreman* (5 Ves. 207), where the testator bequeathed a fund to A. for life, and after her death to P. and S. in equal moieties, with a direction that in case of the death of either of them in the lifetime of A., the whole should go to the survivor living at her decease, and both died in the lifetime of A.,—it was held that the original gift to A. was not defeated and the gift over did not take effect. Here the legatees took vested interests at the death of the testator, subject to be divested in favour of the survivor who might be living at the decease of A.; but as there was no such survivor *at that period*, the divesting contingency never happened (4). See illustration (d).

§ 3. The leaning of Hindu law.—Divesting of estates on the happening of subsequent uncertain events, is not opposed to the spirit of the Hindu law. It is now an established rule (5), that a Hindu may bequeath property by way of executory bequest upon an event which is to happen, if at all, immediately on the close of a life in being, and in favour of a person born in the testator’s lifetime [*Kristoromoney Dasi v. Norendra Krishna Bahadur*, I. L. R. 16 C., 383; L. R. 16 I. A. 29, 39; *Soorjeemoney Dasi v. Denobundoo Mullick*, 9 Moo. I. A. 123; *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, I. L. R. 24 C., 834, 850; L. R. 24 I. A. 76]. So that, if the devise be to the testator’s son absolutely, with the condition (*i.e.*, divesting clause) superadded, that, in case such son should die without leaving male issue (an uncertain event), “the thing bequeathed shall go to another person,” in defeasance of the original gift; and if the event contemplated does happen,

(1) 1 *Rop. Leg.* 676, 3rd Edn.; *Wms.* 1278; 2 *Jarm.* 13, 4th Edn.

(2) *Wms.* 1279; *Hawk.* 266; 1 *Jarm.* 827, 4th Edn.; *Theob.* 446, 3rd Edn.; 570, 5th

(3) *Theob.* 447, 3rd Edn.; 571 5th Edn.

(4) 1 *Jarm.* 827, 4th Edn.; *Hawk.* 267; *Wms.* 1278; *Theob.* 570 5th Edn.

(5) See Sec. 111, p. 45, *ante*.

[Edn.

that is, the son dies without leaving male issue, the gift to the son will be defeated, and on the defeasance of such prior gift, the gift over (a) "to another person" will take effect [*Soorjeemoney Dasse v. Denobundoo Mullick, supra*]. The rule has been applied in other cases also. [See *Tarakeswar Roy v. Shoshi Sekhureswar Roy*, I. L. R. 9 C., 952; L. R. 10 I. A. 51; 13 C. L. R. 62; *Rai Kisori Dasi v. Debendra Nath Sircar*, I. L. R. 15 C., 409; L. R. 15 I. A. 37; *Bissonath Chunder v. Bama Soondary Dasse*, 12 Moo. I. A. 41; *Ram Lal Mookerjee v. Secretary of State for India*, I. L. R. 7 C., 304; L. R. 8 I. A. 46; 10 C. L. R. 349; and also *Tagore v. Tagore* 9 B. L. R. 377; 18 W. R. 359.] See sec. 111 (S), *supra*.

It must be noted, that a clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person or persons [*Amula Charan Seal v. Kali Das Sen*, 1 Cal. L. J. 270 I. L. R. 32 C., 861.]

As to whether on the happening of the event the thing bequeathed goes to another person (the survivors) with the accrued shares, see *Tarakeswar Roy v. Shoshi Sekhureswar Roy, supra*, where it was held that such shares passed with the original shares to the surviving brothers, their Lordships observing, "that such a course of devolution is the ordinary course for Hindu property as between brothers inheriting from brothers, and would present itself most readily to the mind of a Hindu testator." This is at variance with the English law according to which, when a fund is given to a class of persons, with a direction that, on the death of any of them, their shares are to go over, the original shares only, and not the accruing shares, will go over. See *Pain v. Benson*, 3 Atk. 80.

§ 4. Condition not to dispute the will [Illustration (b)].—In England, a condition that the legatee shall not dispute the will, though valid in law, is considered as *in terrorem* merely, and does not effect a forfeiture by reason of the legatee's having disputed the validity or effect of the will, unless there is a gift over on breach of the condition [*Cook v. Turner*, 15 M. & W. 727; *Powell v. Morgan*, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 404; *Cleaver v.*

(a) In cases of gift over, the question is not whether the gift over was good in the event which happened afterwards, but whether it was good in its creation. Thus, where two brothers, K. and N., executed a deed purporting to provide for the permanent devolution of their respective properties in the direct male line, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other; and it appeared that K. died leaving his only son A. as his heir, and A. died without leaving any male issue; and it was contended that the share of the property which devolved upon A. by right of inheritance came into the possession of N. on the death of A., as under the terms of the deed (or will) there was a gift over in his favour and his male descendants. It was held, that supposing there was a gift over the conclusion would amount to this, that K. made a bequest in favour of his brother, N. or any male descendant in the male line of the same, however remote, upon the extinction of his own male line at any time and after any number of generations, and that such a gift over, being on indefinite failure of male issue, was illegal. In delivering their Lordship Judgment Mr. Ameer Ali said: It is clear from the document that if there was any idea at all in the mind of K of a gift over in favour of N on his male descendants, it was dependent on the contingency of the indefinite failure of male issue in his own line. At the time the document was executed there is no reason to suppose that he contemplated that his son would die without issue, or that N. would survive him. And therefore, if it were assumed that a gift over was intended, it would be wholly invalid in view of the clear rule of law laid down in the *Tagore case* [*Purnasashi Bhattacharji v. Kalidhan Ray Chowdhuri* (1911) I. L. R. 38 C., 603; 15 C. W. N. 693; 13 Bomb. L. R. 451; 8 A. L. J. 681; 21 M. L. J. 119; 14 C. L. J. 1].

Sperling, 2 P. W. 528]. But this doctrine has never been applied to devises of real estate; on the contrary, in *Cook v. Turner supra*, it was expressly decided that such a condition annexed to a devise of land was valid and effectual without a gift over upon breach of the condition (1).

A condition subsequent as in illustration (b) is thus valid in this country without a gift over, "and ought not to be treated as if it had been inserted merely to frighten the legatee by an unmeaning threat" (*Law Commissioners' report*) (2).

§ 5. Validity of such Condition.—Such condition will not, however, though valid, avail to make an invalid disposition valid [*Cooke v. Turner supra*: see *Stevenson v. Abingdon* (1862) 11 W. R. (Eng.) 935; *Warbrick v. Varley* (1861) 30 Beav. 347]. Nor it will operate to prevent the legatee from instituting proceedings necessary for the protection of his rights [*Rhodes v. Muswell Hill Land Co.* (1861) 29 Beav. 560], as by filing a bill to have the will construed [*Black v. Herring* (1894), 79 Md. 146; S. C. 28 Atl. 1063], or suing the executor to recover property disposed of by the will, or even by cross-examining at probate [*In re Bratt*, 32 N. Y. Supp. 168] (3).

§ 6. Effect of success in the dispute.—But one may successfully dispute the will without forfeiting [*Cooke v. Turner supra*]. The reason is that, if the disputant succeeds in overthrowing the will entirely on the ground that it was obtained by fraud or undue influence, or because the testator was not of sound mind, or that the will had been revoked, the situation is the same as if there never had been such a will, so that he will take whatever he would get as on an intestacy, regardless of the provisions of the will. (4).

60. [119 (S)].—An ulterior bequest of the kind contemplated by the last preceding section cannot take effect, unless the condition is strictly fulfilled.

Condition must be strictly fulfilled.

Illustrations.

(a) A legacy is bequeathed to A., with a proviso that, if he marries without the consent of B, C, and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.

(b) A legacy is bequeathed to A., with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(c) A legacy is bequeathed to A., to be paid at 18, or marriage, with a proviso that, if A. dies under 18, or marries without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

(1) Wms. 1270-80; 2 Jarm. 58, 4th Edn.

(2) Sec. 113(S), Intro. notes.

(3) Page § 683, p. 808; Theob. 543, 544, 5th Edn.; Wms. 1019, n (a) 10th Edn.; Jarm. 1548, *et seq.*, 6th Ed.

(4) Rood. § 217, p. 416; Theob. *ibid.*

NOTES AND COMMENTARIES.

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| <p>§ 1. <i>The section.</i></p> <p>§ 2. <i>"Strictly fulfilled."</i></p> <p>(a) <i>Condition of residence.</i></p> <p>(b) <i>Where no breach no forfeiture.</i></p> <p>(c) <i>Personal residence.</i></p> <p>(d) <i>Wilful breach only works for-
feiture.</i></p> | <p>§ 3. <i>Hindu widow's right to mainten-
ance on condition of residence.</i></p> <p>§ 4. <i>Estoppel by acceptance of legacy
burdened with condition.</i></p> <p>§ 5. <i>Illustration (a).</i></p> |
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Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. **The section.**—This section corresponds to section 29* of Act IV of 1882 (Transfer of Property Act). The ulterior bequest referred to in this section depends upon the condition subsequent on the non-fulfilment of which it comes into operation. Obviously, this section points to the distinction that exists between a condition precedent and a condition subsequent as regards the strictness required in their fulfilment. It has already appeared that, as a general rule, "such conditions annexed to estates as go in defeasance, and tend to the destruction of the estate, being odious to the law, are construed or expounded strictly, and shall not be extended beyond their words" (1). Hence the rule under this section for the condition being "strictly fulfilled." On the other hand, the same principle which favours strict fulfilment in the case of conditions subsequent, disfavours such fulfilment when these conditions are precedent; so that in cases of the latter conditions, it is said that "as the estate cannot commence until the condition is performed, the condition is beneficial as creating an estate and ought to be construed favourably" [*Scott v. Tyler*, 2 Dick. 712; 2 W. and T. L. C. 115]. Hence the rule of *cypres* or substantial performance which section 115 (S) prescribes. The principle above referred to, is the leaning of the Court in favour of vesting of estates [sec. 91 (S) § 2].

§ 2. "Strictly fulfilled."—

(a) **Condition of residence.**—With regard to conditions requiring residence in any particular place, no general rule seems to have been laid down. Necessarily, each case must be decided according to its own circumstances, regard being had to the intention of the testator, so far as it can be ascertained from his will. But it is clear that, in order to make the condition effectual the meaning of the testator must be reasonably clear and precise. Besides, there should be a definite period for residing specified in the will; for, in the absence of any such specification of the period, it may be argued, that in order to satisfy the condition, the devisee must either live in the house all his life; or that, in case he should constantly keep up an establishment there, that will be sufficient compliance if he goes there only once in his lifetime [see *Wynne v. Fletcher*, 24 Beav. 430; *Wolcot v. Botfield*, Kay. 534; *Parry v. Roberts*, 19 W. R. Eng. 378; *Dunne v. Dunne*, 3 Sm. and G. 22; *Stone v. Parker*, 29 L. J. Ch. 874;

* An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Fillingham v. Bromley, T. R. 530; *Clavering v. Ellison*, 3 Drew. 451 (1). In *Ganendra Mohun Tagore v. Juttendra Mohun Tagore* [14 B. L. R. 60; L. R. 1 I. A. 387; 22 W. R. 377] the principle deducible from these cases as to the meaning of the word "residence," has been thus explained:

Meaning of "residence." "Where in a condition of residence no manner or period

of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition." It is therefore settled that, there can be no question as to the validity of conditions requiring residence in any particular place [*Ganendra Mohun Tagore v. Juttendra Mohun Tagore*, *supra*; *Bhubatarini Dehya v. Peary Lal Sanyal*, I. L. R. 24 C., 646; 1 C. W. N. 578; Cf. *Shyma Charan Bhattacharyee v. Sarup Chandra Sen* (1912) 17 C. W. N. 39].

(b) **Where no breach no forfeiture.**—Where a testator gave a legacy to G. for life, "provided, as a *sine qua non*" (an indispensable condition) that he "within six months after my decease shall enter upon and take possession of" the property devised as his residence and place of abode, and "shall thereafter during his life continue to reside thereon for at least six months (but not necessarily consecutively) in every year," and after G's death or his failing to take possession and to reside on the property, the testator devised the same to G's first and other sons in tail male; and G took possession within six months after the testator's decease, but, as to his residence, during the year following the expiration of the six months, he was in the house for 18 days only, and from the first of January to the 24th December in the year following, the date of such expiration, for not more than 24 days; and had placed the house in charge of a staff of servants, paid the rates, kept horses and poultry in the stables and in the grounds, and his son who was at College near had stayed at the house on an average, on every alternate Saturday till Monday; it was held that there was no forfeiture, as there had been a reasonable if not a strict, compliance with the condition of residence [*In re Moir, Warner v. Moir*, L. R. 25 Ch. D. 605] (2).

So where a testator provided that if any devisee or tenant for life shall cease to use as his residence in Calcutta, "the said *Baitakhana* houses and premises where I now reside, and make use and enjoy my library, houses, carriages, &c., in the said house, and jewels, gold and silver plates, &c., in my use and possession, then and immediately thereupon the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person * * * so ceasing * * * to use as his residence my said *Baitakhana* house, had then died;" it was found on evidence that since the tenant for life, the respondent, had entered upon possession, the house was constantly kept open, new furniture added to the old, the library taken care of, and *durvans* and menial servants allowed to live therein, and that the respondent himself frequently, if not daily, went to the house, and spent several hours there, and also transacted all affairs of business

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there and occasionally received visitors in rooms properly furnished for their reception. Their Lordships of the Judicial Committee held that there had been no breach of the condition contained in the clause [*Ganendra Mohun*

(1) See 2 Jarm. 57, 4th Edn.; Theob. 547-48, 5th Edn.

(2) Hend. 259-60; Theob. 548, 5th Edn.

Tagore v. Juttendra Mohun Tagore, or simply *Tagore*^{*} v. *Tagore*, L. R. 1 I. A. 387; 14 B. L. R. 60; 22 W. R. 377] (1)

In *Bhobatarini Debya v. Peary Lall Sanyal* [I. L. R. 24 C., 646; 1 C. W. N. 578], however, it was held that occasionally going to reside in her husband's family dwelling house was not sufficient fulfilment of a condition imposed upon the testator's widow, to the effect that if she should reside there or in any holy place she will receive an allowance of Rs. 10, otherwise shall be entirely deprived of all rights (at p. 656).

(c) **Personal residence.**—Thus although from the terms of the will it may be reasonably inferred that personal residence is required, it seems, such residence to the extent indicated by the above cases, will amount to a fulfilment of the conditions imposed. So it has been held that personal residence in any specified place for any part of a day is sufficient residence for that day, and it is not necessary to pass the night of that day there [*Wolcot v. Botfield*, Kay. 534, 550] (2).

Where A. devised a house on trust to permit C. to hold it free of rent, on condition of her remaining single and residing upon the premises during her life-time, and C. resided in the house till marriage and for ten years after, and then rented it, excepting one room which she used occasionally; it was held that, "residing" meant personally residing, and her act did not amount to residing [*In re Wrigat: Mole v. Issort* (1907) 1 Ch. 231]

As to whether forfeiture was effected the Court was of opinion that, reading the two conditions together, the words meant during C.'s lifetime while she was capable of residing as a spinster and so, upon her marriage, the condition as to residence did not apply and there was no forfeiture [*Ibid.*].

(d) **Wilful breach only works forfeiture.**—The breach of a condition which is to deprive a legatee of his vested interest, must be wilful and intentional breach. Thus where a testator provided, "My first and second wives shall together be entitled to twelve annas of all the properties left by me," and added a clause to the effect that "If there should be any dispute or disagreement between my two wives, or if there being any disagreement between either or both of them and the executors above named she or they live in my family dwelling-house, or according to the rules of Hindu religion in some holy place, maintaining a good character, then each of them shall receive a monthly allowance of Rs. 10 for maintenance, but if otherwise she shall be entirely deprived of her right;" and it was found on evidence that the younger of the two wives wilfully and intentionally quarrelled with the elder and with the executor, and resided neither in the testator's family dwelling-house, nor in any holy place, but in her father's house; it was held, that the condition about residence was clearly broken and it worked a forfeiture [*Bhoba Tarini Debya v. Peary Lall Sanyal*, *supra*; *Shyama Charan Bhattacharyya v. Sarup Chandra Sen* (1912) 17 C. W. N. 39].

But under similar circumstances, that is, where the direction was that if any of the female members of the testator's family, from any cause whatever, should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they should forfeit their rights under the will; and a widowed daughter-in-law of the testator, a minor, was removed from his house

(1) Theob. 548, 5th Edn.

(2) See 2 Jarm. 57, 58, 4th Edn.

by her maternal relations and brother with the aid of the police, and resided for more than three months with her mother, it was held that, under the circumstances the said daughter-in-law's absence did not work a forfeiture [*Tincouri Dassee v. Krishna Bhabini*, I. L. R. 20 C., 15]. On the same principle, in cases of marriage with consent, if the consent becomes unattainable by the death of the person or persons whose consent is required, a marriage without consent will not cause a forfeiture, where the condition is subsequent. [*In re Brown's Will*, L. R. 18 Ch. D. 61] (1). But see *illus. (a)*.

Mere legal infancy will not justify a breach [*Tincouri Dassee v. Krishna Bhabini*, *supra*].—A widow authorized to adopt does not forfeit her rights by not adopting [*Umasundary Dabee v. Sourobin Dabee*, I. L. R. 7 C., 288; 9 C. L. R., 83; *Baman Das Mookerjee v. Tarinee*, 7 Moo. I. A. 169, 190; see *Prasannamayi Dasi v. Kadambini Dasi*, 3 B. L. R. O. C. 85].

§ 3. Hindu widow's right to maintenance on condition of residence.—A Hindu by will, devised the greater part of his property to his nephew M., and bequeathed a house and certain other property to his wife, "if she come to live at Kava," where her husband resided. In a suit for maintenance by the widow, the defence being that the Plaintiff led an immoral life, and forfeited her rights, and further, that she was not entitled to maintenance, unless and until she came to reside at Kava, as directed by her husband's will, it was held that inasmuch as, the defendants, who were in possession of the testator's property, blackened the plaintiff's character, and she could not therefore happily live at Kava, she was justified in residing elsewhere, and such conduct did not amount to a breach of condition [*Mulji Bhaishankar v. Bai Ujam*, I. L. R. 13 B., 218]. So it has been held that a Hindu widow may, without forfeiting her right to maintenance, reside wherever she likes, in violation of her husband's direction to the contrary, provided she remains chaste, and there is just cause for her leaving the family dwelling-house of her husband [*Rajah Pirthee Singh v. Rani Raj Koer*, 12 B. L. R. 238; *Mulji Bhaishankar v. Bai Ujam*, *supra*; *Girianna Murkundi Naik v. Honama*, I. L. R. 15 B., 236; *Promotha Nath Roy v. Nagendrabala Chaudhuranee*, 12 C. W. N. 808; 8 C. L. J. 489].

§ 4. Estoppel by acceptance of legacy burdened with condition.—If a legatee accept his legacy with a condition annexed to it, he is estopped, by his own conduct and cannot afterwards decline to perform a duty which is thereby imposed on him [see *Att. Gen. v. Christ's Hospital*, Taml. 393; *Gregg v. Coates*, 23 Beav. 33] (2). See *post* sec 69 (P), § "Estoppel."

§ 5. Illustration (a).—The illustration is taken from *Peyton v. Bury* [P. W. 626]. In that case, the testator "bequeathed the residue of his personal estate to S., provided she married with the consent of A. and B., his executors in trust, and if S. should marry otherwise, he bequeathed the said *residuum* to W. A. died, after which S. married without the consent of B. The Master of the Rolls observed, it was very clear that, in the nature of the thing, and according to the intention of the testator, this could not be a condition precedent; for, at that rate, the right to the residue might not have vested in any person whatever for twenty or thirty years after the testator's death, since both of the executors might have lived, and S. have continued so long unmarried, during all which time the right to the residue could not be said to be

(1) *Hend. T. S.* 123, 2nd Edn.

(2) *Jarm.* 60, 4th Edn.

(beneficially) in the executors, they being expressly mentioned to be but executors in trust. Of this case Sir W. Grant observed, that the bequest over shewed what the testator meant by making marriage with consent a condition in the previous gift, namely, that marriage without consent was to be a forfeiture" (1). This is an example of a case in which the same words may make a condition precedent or subsequent according to the nature of the thing and the intention of the testator. See sec. 113 (S), *supra*.

So a condition subsequent requiring the consent of several persons is discharged by the death of all, or even of one of them, though in the latter case it would seem the consent of the survivors is sufficient [*Peyton v. Bury*, *supra*; *Jones v. Suffolk*, 1 Bro. C. C. 528; see *Dawson v. Oliver Massey*, L. R. 2 Ch. D. 753; *Aislabie v. Rice*, 3 Madd. 256] (2).

Original bequest not affected by invalidity of the second.

61. [120 (S)].—If the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations.

(a) An estate is bequeathed to A. for his life, with a condition superadded that if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(b) An estate is bequeathed to A. for her life, and if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.

(c) An estate is bequeathed to A for life, and if he marries, to the eldest son of B for life. B. at the date of the testator's death, had not had a son. The bequest over is void under section 92, and A is entitled to the estate during his life.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *"Bequest be not valid."*

§ 3. *Where condition vague.*

§ 4. *Repugnant conditions.*

§ 5. *Repugnancy and inconsistency.*

Extent of the Section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, Sikhs, &c.

§ 1. *The section.*—It has already appeared [sec. 113 (S) *supra*.], that where a condition subsequent is impossible, impolitic, or illegal, it is the doctrine as well of the Common law as of the Civil, that the condition is void, and the legacy single and absolute [*Lowther v. Cavendish*, 1 Eden. 99; *Walker v. Walker*, 2 D. F. and J. 255] (3). The validity or otherwise of an *ulterior bequest* depends upon that of the condition subsequent on the fulfilment of

(1) 2 Jarm. 5, 4th Edn.

(2) Wms. 1284; Theob. 541, 5th Edn.

(3) Wms. 1270; Theob. 493, 5th Edn.

which such bequest is to take effect. If therefore, the fulfilment of such condition is impossible or contrary to law or morality (or impolitic or illegal) the bequest which depends upon such fulfilment, must necessarily be void [see sections 113(S) and 114(S), *supra*,] with the result that the original bequest will remain unaffected.

Thus from the illustrations it will appear that, in illus. (a) and (b), the condition superadded, on the fulfilment of which the ulterior bequest or the gift over is to take effect, being void,—in (a) because of impossibility, and in (b) on account of its being *contra bonos mores* (i.e. against good morals)—such ulterior bequest is invalid; so that the original bequest to A remains unaffected.

§ 2. "Bequest be not void."—But then, a bequest is not invalid because of its depending upon impossible condition alone. Its invalidity may be due to other causes as well. For instance, where a bequest over or the ulterior bequest is void, being too remote, or by reason of the devisee being unborn at the time of the testator's death, or for any other similar cause, the original bequest will not be affected by it [see illus. (c); see also *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, I. L. R. 24 C., 834; and *Anandrao Vinayak v. Administrator General of Bombay*, I. L. R. 20 B., 450]. Thus an original vested gift will not be qualified by a subsequent gift which is void. Or, which amounts to the same thing, "specific trusts or specific estates good in themselves are not invalidated by a subsequent illegal disposition of the residue or remainder." [See *Khettermohan Mullick v. Gunga Narain Mullick*, 4 C.W.N. 671 at 677 (n); see also *Blease v. Burgh*, 2 Beav. 221; *Ring v. Hardwick*, *Ibid.*, 352; *Carver v. Bowles*, 2 R. and M. 306]. The general rule is that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect [*Green v. Harvey*, 1 Hare. 428, 431] (1).

A gift over in the event of a change of religion by the legatee is valid, [*Hodgson v. Halford*, L. R. 11 Ch. D. 959] (2).

§ 3. Where condition vague.—A bequest is also invalid when the condition on the fulfilment of which it depends, is too vague or uncertain, to enable the Court to say what is meant by it [*Clavering v. Ellison*, 3 Drew. 451; *Fellingham v. Bromley*, T. and R. 530] (3).

§ 4. Repugnant conditions.—These are also classed among illegal conditions subsequent. They are such as are repugnant to the grant or gift, by which they are created, or to which they are annexed. Thus, "if a testator, after giving an estate in fee, proceeds to qualify the devise by a proviso or condition, which is of such a nature as to be incompatible with the absolute dominion and ownership, the condition is nugatory, and the estate absolute. Such would, it is clear, be the fate of any clause providing that the land should for ever thereafter be let at a definite rent, or be cultivated in a certain manner" (4). Conditions making property inheritable otherwise than in accordance with law, are also repugnant [see *Tagore v. Tagore*, 9 B. L. R. 377]. See sec. 125(S) § 6 and 7 *post*.

Repugnancy and inconsistency convey nearly the same meaning. The general rule in respect to inconsistent clauses is, as it has already appeared [sec. 75 (S)

(1) Wms. 1271; Theob. 410, 3rd Edn.; 2 Arm. 19, 3rd Edn.

(2) Theob. 543, 5th Edn.

(3) Wms. 1271.

(4) 2 Jarm. 14, 4th Edn. Shep. T. 129.

supra], that where two clauses are so inconsistent with each other that they cannot stand together, the clause which is posterior in local position shall prevail (1). But where the posterior clause is a condition repugnant to or destructive of the estate intended to be created by the prior clause, as indicated above, it is such prior clause which overthrows or prevails over the subsequent one, and not the subsequent over the prior one. This then is a qualification or limitation added to the general rule (2). These two rules are based upon two different principles. See sec. 75 (S) *ante* and 125 (S) *post*.

§ 5. Repugnancy and inconsistency distinguished.—See 125 (S) *post*.

62. [121 (S)].—A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Bequest conditioned that it shall cease to have effect in case specified uncertain event shall happen or not happen.

Illustrations.

(a) An estate is bequeathed to A for his life, with a proviso that in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood: he loses his life-interest in the estate.

(b) An estate is bequeathed to A, provided that if he marries under the age of 25 without the consent of the executors named in the Will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

(c) An estate is bequeathed to A, provided that if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(d) An estate is bequeathed to A, with a proviso, that if she becomes a Nun she shall cease to have any interest in the estate. A becomes a Nun. She loses her interest under the Will.

(e) A fund is bequeathed to A for life, and after his death to B, if B shall then be living, with a proviso that if B shall become a Nun, the bequest to her shall cease to have any effect. B becomes a Nun in the lifetime of A. She thereby loses her contingent interest in the fund.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. "*In terrorem*."

Extent of the section.

This section is embodied in the Hindu Wills Act and applies to the Hindus, Jains, &c.

§ 1. **The section.**—The object of this section is to expressly get rid of the rule of the Civil law under which certain conditions subsequent were, in the case of personality, held by the Courts in England to be void, and *in terrorem*.

(1) 1 Jarm. 472, 4th Edn.; Shep. T. 451; Bigelow. 219.

(2) Bigelow. 218—22; 229-30.

merely if there were no gifts over [see sec. 118 (S) § 2 *supra*]. Thus in *Bhoobun Mohini Debya v. Hurrish Chandra Chowdhury* [I. L. R. 4 C., 23; L. R. 5 I. A. 138; 2 C. L. R. 339], where a Hindu granted a taluk to his sister in these terms: "You are my sister; I accordingly grant you a taluk for your support. * * *. Being in possession of the lands, and paying rent according to the *tahut jumma*, do you and the generations born of your womb successively enjoy the same. No other heir of yours shall have right or interest;" it was held, that the donee took an absolute estate defeasible in the event of a failure of issue living at the time of her death: the defeasance being expressed in the words, "No other heir of yours shall have right or interest." See *supra* sec. 119 (S), § 2 (a), (b), (c), and (d).

§ 2. "In terrorem."—"By this expression is meant one introduced into a will merely to so influence a legatee by fear as to deter him from doing something, and such a condition will in general, not have any operation beyond producing the effect in question. The term would be applicable in a case where there is a condition subsequent attached to a legacy, but without a gift over in case of non-compliance therewith, for the condition in such case would be merely *in terrorem*" (1) *i.e.* by way of terrifying.

Where the testator in 1897 bequeathed to his wife Ruth, all his real and personal property, and the wife was to have complete and sole control thereof during her lifetime "on condition that Ruth do not marry again after my decease," but there was no gift over in case of the marriage, it was held that the condition was void being one *in terrorem* merely [*Pettifer v. Pettifer* (1900), 5 C. W. N. xi].

But see sec. 118 (S) § 3, *supra*.

63. [122 (S)].—In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by the 107th section.

Such condition must not be invalid under section 107.

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to Hindus, &c.

§ 1. **The section.**—This section lays down the rule that a condition will fail to operate unless it possesses the legal attributes required by section 107: so that, if the condition be invalid, the gift will not be affected by the divesting clause. Thus, where it is provided that the gift is to be divested "in the absence of the said—'s son, grandson, great-grandson, and so on," or "if, hereafter, on the death of the several persons who I have determined in this will shall be my *sthalabhishikta*, no one, whoever it be, (entitled) to become my *sthalabhishikta*, should remain alive"; it was held that such conditions of indefinite failure of male issue or of general failure of heirs being void, the gift will not be affected by them [*Lalit Mohun Singh Roy v. Chukkun Lal Roy*, I. L. R. 24 C., 834; L. R. 24 I. A. 76; 1 C. W. N. 387].

§ 2. "The 107th section."—Is not this a misprint for Section 101 ?

64. [123 (S)].—Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject matter of the bequest shall go to another person, or the bequest shall cease to have effect, but no time is specified for the performance of the act ; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Result of legatee rendering impossible or indefinitely postponing an act for which no time is specified, and on the non-performance of which the subject matter is to go over.

Illustrations.

(a) A bequest is made to A with a proviso that unless he enters the army the legacy shall go over to B. A takes holy orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(b) A bequest is made to A with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Time for the performance of the act.*

Extent of the section.

This section has been incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. **The section.**—This section may be compared with section 33* of the Transfer of Property Act (Act IV of 1882), which corresponds to it, and section 34 of the Indian Contract Act (Act IX of 1872), which provides that, where the event upon which a contract is contingent is the future conduct of a living person, it shall be considered to become impossible, when he does anything which renders it impossible that he should act in the manner contemplated within any definite time, or otherwise than under further contingencies. See *Shyama Charan Bhattacharya v. Sarup Chandra Sen* [(1912) 17 C. W. N. 39]. The facts of this case are noted in § 4, sec. 106 (S), *ante*, at p. 380, *supra*].

§ 2. **Time for the performance of the act.**—It is difficult, from the absence of any specified time, to determine the period within which the condition

* Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for the performance.

is to be performed ; that is, whether the legatee is bound to perform the act within a reasonable time after the vesting of the interest, or he is at liberty to perform it at any time during the course of his lifetime. But there are circumstances under which a whole lifetime has been deemed a reasonable time for the performance of the act. Thus where a testator, after giving certain legacies to J. and M. added, "if either of these girls should marry into the families of G. or R., and have a son, I give all my estate to him for life (with remainder over) ; *and if they shall not marry,*" then he gave the same to other persons ; it was held that nothing vested in the devisee over while the performance of the condition by J. or M. was possible, which was during their whole lives ; and that their having married into other families did not preclude the possibility of their performing the condition, as they might survive their first husbands [*Randall v. Payne*, 1 Bro. C. C. 55] (1).

Here the performance of the act was indefinitely postponed, and the gift over, would, it seems, under this section, take effect.

65. [124 (S)].—Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

Performance of condition, precedent or subsequent, within specified time.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *"Specified time."*

§ 3. *Ignorance or illness is no excuse.*

§ 4. *"Prevented by fraud."*

Extent of the Section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. The section.—This section is reproduced in sec. 137, para 2, of Act V of 1881 [see sec. 137 (P), *post*]. It may be compared with section 34 of the Transfer of Property Act (except the proviso) which lays down that, "if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time

shall, as against him, be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud." The omission of the words *Italicised* (or some such words) in this section seems to be intentional [see *Tincouri Dassee v. Krishna Bhabini*, I. L. R. 20 C., 15, noted in section 119 (S), § 2 (d)].

The section purports to mean, that a condition in a will must be performed according to its terms, specially as to the time specified for its performance; and the Court has no power to relieve the legatee from any such term [*Brooke v. Garrod*, 3 K. & J. 608; *Austin v. Tawny*, L. R. 2 Ch. 143; see also *Simpson v. Vickers*, 14 Ves. 341, 348], "unless the performance of it be prevented by fraud" (1).

§ 2. "**Specified time.**"—Where an act is required to be performed within a specified time after the testator's decease, the period "is to be calculated from the death of the testator, exclusive of the day of his death, and must be a period immediately following his death" [*Webb v. Webb* 2 Beav. 493; *Gorst v. Lowndes*, 11 Sm. 434; *Lister v. Garland*, 15 Ves. 245] (2).

§ 3. **Ignorance or illness is no excuse.**—Ignorance is no excuse. Accordingly, a condition subsequent not performed owing to the ignorance of the legatee of its existence nevertheless works a forfeiture [see *Astley v. Earl of Essex*, L. R. 18 Eq. 290; *Porter v. Fry*, 1 Vent. 197]. So does illness [*In re Hodges' Trusts*, L. R. 16 Eq. 92]. The principle is, that a person who takes under a will cannot plead want of knowledge of the will. But this does not apply where the devisee is the heir who has a title independent of the will [*Doe d. Taylor v. Crisp*, 8 Ad. & E. 778], (3). "For as he has, independently of the will, a title by descent, it is not necessarily to be presumed, from his entry on the land, that he is cognizant of the condition." Hence, devisee being an heir of the testator, he is entitled to a notice of the condition (4).

§ 4. "**Prevented by fraud.**"—In cases of condition requiring marriage with consent, it is not unfrequently that such consent is "fraudulently withheld by the proper party, for the express purpose of defeating the gift or legacy, or of insisting upon some private and selfish advantage, or from motives of a corrupt, unreasonable or vicious nature." Such cases are evidently within the contemplation of this section.

(1) Theob. 191, 5th Edn.

(2) 2 Jarm. 3, 4th Edn.; Theob. 535, 5th Edn.

(3) Theob. 542, 5th Edn.; Hend. T. S. 126, 2nd Edn.; 2 Jarm. 14, 3rd Edn.

(4) 2 Jarm. 13-14, 3rd Edn.

The Hindu Wills Act.

[PART XVII, ACT X, 1865].

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

- 66. [125 (S)].** Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Direction that funds be employed in a particular manner following an absolute bequest of the same to or for the benefit of any person.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 9. <i>Condition prohibiting partition, &c.</i> |
| § 2. <i>The principle.</i> | § 10. <i>Examples of repugnant conditions.</i> |
| § 3. <i>Where the application is to be regulated by the discretion of another.</i> | § 11. <i>Where condition restraining alienation is not repugnant.</i> |
| § 4. <i>Where the primary object is to be seen.</i> | § 12. <i>Condition restraining alienation to a limited extent.</i> |
| § 5. <i>Where the gift is for the benefit of the legatee.</i> | § 13. <i>Absolute by adverse possession.</i> |
| § 6. <i>Where the gift is absolute.</i> | § 14. <i>Absolute by power of appointment.</i> |
| § 7. <i>The word "absolute" as creating absolute interest.</i> | § 15. <i>Repugnancy and inconsistency.</i> |
| § 8. <i>Condition in absolute restraint of alienation.</i> | § 16. <i>'Fund,' what it implies.</i> |

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees.

§ 1. The section.—This is one of those sections which are founded on

Founded on public policy.

the public policy which condemns any attempt to restrain the free disposition and circulation of property for the interest of commerce and general progress of society. It partakes of the nature of conditional bequests and furnishes a limitation to the rule, that the later of two inconsistent clauses must prevail [sec. 72 (S) *ante*]. Sir F. V. Williams says:—"Where there is a bequest of money to, or in trust for, legatees absolutely, but with a direction for the enjoyment or application of the money in a particular mode, for their benefit as where it is given to purchase an annuity for the legatee, or to place him out apprentice, or, &c., the legatees will be entitled to receive the capital money immediately, regardless of the particular modes directed for the enjoyment or application [*Knox v. Hotham* (Lord) (1845) 15 Sim. 82; *Lassence v. Turney* (1849) 1 Mac. & G. 551; *Re Skinner's Trusts* (1860) 1 John & H. 102] (1). In other words, where bequests are given absolutely to any person or for the benefit of any person with words added expressing a purpose for which the gift is made, and directing that the legacy shall be applied or enjoyed for such purpose only, the legatee shall be entitled to claim the gift without applying it to that purpose, as if the will had contained no such direction.

Similarly, where a legatee takes an absolute vested interest in a sum of money on attaining the age of twenty-one, a direction that the sum is not to be paid to him [*Curtis v. Lukin* (1842), 5 Beav. 147, 155; *Re Johnston : Mills v. Johnston* (1894) 3 Ch. 204; *Re Couturier : Couturier v. Shea* (1907) 1 Ch. 470] or is to be accumulated [*Josselyn v. Josselyn* (1837) 9 Sim. 63; *Gosling v. Gosling* (1859) John. 265] until a subsequent period, is to be disregarded, unless during the interval the property is given to another (2).

This section may be compared with sections 10 and 11 of the Transfer of Property Act (IV. of 1882) (a).

§ 2. The principle.—This section may be divided into two branches.

The first, where the gift is absolute; the second, where it is "for the benefit of any person." In this view it seems to proceed on two principles. So far as the gift is absolute, it is based on the principle that, to control the application and enjoyment of what is absolutely given is repugnant to the very nature of the interest created thereby. As regards the second branch, the principle is, that the legatee ought not to be compelled by a Court to do what he may undo

(a) "10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan, or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

"11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction."

"Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property or to compel the enjoyment thereof in a particular manner."

the next moment, as by selling the residence or giving up the business (see illustration). The same principle applies where the nature of the property is directed to be changed, for the legatee may claim it in its original state; "but in such case, if there be more than one donee interested in the gift, the deviation from the testator's directions cannot be made without the consent of all, as if the house when purchased was to be conveyed to or settled on two or more persons." (1).

§ 3. Where the application is to be regulated by the discretion of another.—In cases where the testator gives a present interest in money to a legatee, directing the application of such money to be regulated by the discretion of some one else, the rule is that, if the discretion (whether it is prescribed to be exercised by the testator himself, or by any other person) is not exercised, or an accident happens which prevents the employment of the money in the way contemplated, the gift will prevail. "The mode of application may fail, but that will not interfere with the substance of the gift." [See *Gough v. Butt*, 16 Sim. 45; *Present v. Goodwin*, 1 Sw. and Tr. 544] (2).

Where the testator directed his trustees to pay to his wife a certain sum of money absolutely for her personal expenses, providing that, "should my wife not conduct herself * * * according to the directions of my above mentioned other *vakil*s, not even a single cent is to be paid to her"; it was held, that the provision as to the control of the manner of the expenditure could not be given effect to [*Bai Mamubai v. Dossa Morarji*, 1 L. R. 15 B., 443].

§ 4. Where the primary object is to be seen.—If the purpose for which the money is given is not merely the benefit of the legatee, but also the gratification of some wish of the testator, the question is, which is the primary object [*Re Skinners Trusts*, 1 J. and H. 102] (3).

"Where the motive or purpose of the gift is the benefit of other persons, as well as the primary donee, three constructions obtain, according to the language used. The purpose may be so peremptorily expressed as to constitute a perfect trust; or may be such as to leave entirely in the discretion of the primary donee the *quantum* of benefit to be communicated to the other persons provided that such discretion is honestly exercised; or lastly, the expression of motive or purpose may be merely nugatory and not operate to abridge the previous absolute gift to the primary donee" (4).

§ 5. Where the gift is for the benefit of the legatee.—A testator left a legacy to his wife in these words: "Rs. 2,000 to be credited in our shop in the name of my wife Bapi. Interest at 6 per cent. to be paid to her every year. If in her lifetime she demands the money to use in a good work, it should be given to her, but if she has not taken it in her lifetime, Jamnadas and Bhagubhai are to dispose of it according to their own pleasure after death." It was held, that the gift was for the benefit of the legatee, the wife, as a provision for her maintenance, and that it was not in favour of good works, but was a bequest to the legatee with a direction in favour of good works, which direction was void under this section and the legatee was entitled to the money [*Bai Bapi v. Jamnadas Hathisang*, 1 L. R. 22 B., 774]. In the above bequest, the mention of good works was "only a direction, and not a condition precedent" [*Ibid*].

(1) 1 Jarm. 396, 397, 4th Edn.; 368 5th Edn.

(2) Wms. 1294, 8th Ed.; 1033, 10th Ed.; Theob. 439, 5th Edn.

(3) Theob. 439, 5th Edn.

(4) 1 Jarm. 368, 3rd Edn.; 398, 4th Edn. 396, 5th Edn.

On the same principle where a testator bequeaths property absolutely but restricts the mode of the enjoyment to secure certain object for the benefit of the legatee, and such object fails, the absolute gift will prevail [*Administrator General, Bengal v. Apcar*, 1 L. R. 3 C., 553].

So where the bequest is for the maintenance and education of the legatee [*Webb v. Kelly*, 9 Sim. 472; *Present v. Goodwin*, 1 Sw. & Tr. 544] or for the purpose of printing a book, the profits on which are to be for his benefit [*Re Skinner's Trusts*, 1 J. & H. 102]; or to bind him apprentice [*Barlow v. Grant*, 1 Vern. 255; *Barton v. Cooke*, 5 Ves. 461]; or to enable him to take holy orders [*Barton v. Cooke*, *supra*, 463]; the legatee will be entitled to claim the money without applying it to the specified purpose (1). So where the legacy was upon a trust to lay out 5000*l.* in planting trees on a settled estate, the sum of 5000*l.* was held to belong to the owners of the estate [*In re Bowes*; *Earl of Strathmore v. Vane* (1896), 1 Ch. 507] (2).

But where a condition subsequent is attached to the annuity (see illustration), the legatee is not entitled to receive the money [*Hatton v. May*, 3 Ch. D. 148]. On the other hand, it has been held that he is entitled to receive the same, even though the testator should have expressly declared that he shall not be permitted to receive it [*Stokes v. Cheek*, 29 L. J., Ch. 922] (3).

Where a person is authorised to draw money for certain purposes "as he may require," he can draw only such amounts "as may be necessary" for the purpose, and not "as he may think fit" [*Annie Wilson v. Geo. Oakes*, 1 L. R. 31 M., 283; 18 M. L. J. 331].

§ 6. Where the gift is absolute.—A gift is *absolute*, when by such gift an interest or ownership is created, entitling the donee to deal with the subject of the gift according to his pleasure, and conferring upon him an uncontrollable power of alienation whether by deed, gift or will. In other words, the powers of a donee under such a gift, "are not confined to any particular mode or modes of dealing with the thing owned, but are of indefinite extent," both as regards possession, use or enjoyment, and alienation thereof (4). So it is said that "*absolute* property means not only unlimited in estate, but unfettered by trust or condition" [James, V. C. in *Iruene v. Sullivan*, L. R. 8 Eq. 673] (5). There are thus certain incidents annexed to an estate created by such a gift. If, therefore, a condition is attached to an estate so created, which is repugnant to the very nature of such estate, that is to say, if such condition is intended "to control and abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute ownership," it is a repugnant condition and is void under this section [*Bradley v. Peixoto*, 3 Ves. 325] (6). The principle is, as already seen, that an estate cannot be deprived of its legal incidents, an attempt to do so being regarded as an attempt to legislate [*Tagore v. Tagore*, 9 B. L. R. 377; 18 W. R. 359]. See *supra* sec. 120 (S) § 4.

§ 7. The word "absolute" as creating absolute interest.—Although the word "absolute" is, generally speaking, sufficient to create an

(1) Wms. 1293; 1 Jarm. 396-97, 4th Edn.; 367-68, 5th Edn.; Theob. 438, 5th Edn.

(2) Theob. 438, 5th Edn.

(3) Wms. 1293, F. n.; Theob. 445, 5th Edn.; 1 Jarm. 397, 4th Edn.; 368, 5th Edn.

(4) Wharton Art. "Fee Simple," Edw. L. of Pro. 1, 2.

(5) 1 Jarm. 388, 4th Edn.

(6) 2 Jarm. 14, 4th Edn.; Bigelow. 2; Wms. 1271; Shep. T. 129-30; Phills. & Trev. 47.

absolute interest there are cases in which the word is used in a restricted sense to denote the extent of interest only without conferring an unfettered and unlimited interest [see *Advocate Gen. Bombay v. Harmusji* I. L. R. 29 B., 375; 7 Bomb. L. R. 236; also *Irvine v. Sullivan supra*]. Thus where a testator declared—"I give, devise and bequeath to my dear wife E. H. the whole of my real and personal property absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof.....I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces; it was held, on appeal, by the House of Lords, that the testator did not intend that his wife should have absolute power of disposition [*Comiskey v. Hanbury*, 9 C. W. N. x c viii].

So words of inheritance do not necessarily confer an absolute interest [see *Dharani Kanta Lahiri v. Siba Sundari Debi*, 35 C., 1069].

§ 8. Condition in absolute restraint of alienation.—It is an established rule, that where a condition in absolute restraint of alienation is annexed to a devise in fee (even though its operation may be limited to a particular time, e.g., to the life of another living person), such condition is void in law. [*In re Rosher*; *Rosher v. Rosher*, L. R. 26. Ch. D. 801; *Bradley v. Peixoto*, 3 Ves. 324; *Shaw v. Ford*, L. R. 7 Ch. D. 669; *In re Machu*, L. R. 21 Ch. D. 838; *Re Elliott*; *Kelly v. Elliott* (1896) 2 Ch. 353; *Foster v. Smith*, 156 Mass. 379; *Van Horne v. Campbell*, 100 N. Y. 287; *Wilson v. Wilson*, 46 N. J. Eq. 321] (5). In *Tagore v. Tagore* [9 B. L. R. 377; 18 W. R. 359], their Lordship of the Privy Council said: "If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or rather as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shewn his intention to create, though he adds a qualification which the law does not recognize." [See *Sonatun Bysack v. Juggut Soondree Dassee*, 8 Moo. I. A. 66; *Bhairo v. Parmeshri Dayal*, I. L. R. 7 A., 516; *Maharam Das v. Ajudhia*, I. L. R. 8 A., 452; *Ashutosh Dutt v. Doorga Churn Chatterji*, I. L. R. 5 C., 438; 6 I. A. 182; 5 C. L. R. 296; *Gokool Nath Guha v. Iswar Lochan Roy*, I. L. R. 14 C., 222; *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*, 2 B. L. R. O C 11; *Krishnaramani Dasi v. Ananda Krishna Bose*, 4 B. L. R. O. C. 231; *Broughton v. Mercer*, 14 B. L. R. O. C. 442; *Anatha Tirtha Chariar v. Nagamuthu Ambalagaren*, I. L. R. 4 M., 200; *Rai Kishori Dasi v. Debendra Nath Sarkar*, I. L. R. 15 C., 409; 15 I. A. 37; *Lala Ram Jewan Lal v. Dal Koer*, I. L. R. 24 C., 406; *Chimanrao Sadashiv v. Rambhau Ghamaji*, 4 Bomb. L. R. 508; *Jehangir v. Kaikhushru*, 13 Bom. L. R. 141].

§ 9. Condition prohibiting partition, &c.—On the same principle a clause prohibiting or postponing partition [*Mokundo Lall Shaw v. Ganesh Chandra Shaw*, I. L. R. 1 C., 104; *Rajendra Dutt v. Sham Chand Mitter*, I. L. R. 6 C., 106; *Rai Kishori Dasi v. Debendra Nath Sarkar, supra*]; or one attempting to free property from its liability to debts, which is one of its legal incidents [*Rai Kishori Dasi v. Debendra Nath Sarkar, supra*], has been held to be invalid. Similarly, where a testator bequeathed the whole of his

property to his only son, who had attained majority at the date of his father's death, and directed that, "At the end of 1000 years my son is to be allowed to enjoy the estate," it was held that this direction which restricted the immediate enjoyment of the property by the legatee, being a condition repugnant, was invalid [*Lloyd v. Webb*, I. L. R. 24 C., 44; see also *Cally Nath Naugh Choudhury v. Chander Nath Naugh Choudhury*, I. L. R. 8 C., 378; *Bramamayi Dasi v. Joges Chandra Dutt*, 8 B. L. R. 400; *Gosavi Shivgar Dayagar v. Rivett-Carnac*, I. L. R. 13 B., 463; *Husenbhoy v. Ahmedbhoy*, I. L. R. 26 B., 319; *Raneemoney Dassee v. Premmoney Dassee*, 9 C. W. N. 1033].

If, however, there is a disposition of the intermediate interest, the restriction is not bad. Thus where a testator after devising a house to his son absolutely, provided that the gift was to be subject to certain limitations to the effect that, the income of the property derivable for 13 years after the testator's death (during which period the devisee was to receive a monthly allowance of Rs. 100 only) was not to go to that son but was to be dealt with by the executors and trustees in carrying out certain specific trusts; it was held, that this restraint on the enjoyment of the property was not repugnant, and that the gift to the son during the said period of 13 years was only a limited one which was to become an absolute gift of the entire interest after the expiration of that period [*Profulla Chandra Mullick v. Jogendra Nath Sreemani*, 1 Cal. L. J. 605; 9 C. W. N. 528. *Lloyd v. Webb*, *supra*, distinguished]. As to whether partition may be prohibited for a term of years, see *Srimohan v. MacGregor* (1901), I. L. R. 28 C., 769 at 786.

The principle on which conditions prohibiting partition are void, has been extended to a case in which a partition being effected by three joint tenants it was agreed between them that on any one of them dying sonless his share should go to the others, and that no one should alienate his share; it was accordingly held in that case that though the agreement might be binding between the parties, it could not bind their representatives [*Venkatramanna v. Bramanna Sastrulee*, 4 M. H. C. R. 345]; nor could such agreement bind persons purchasing from one of such parties [*Anand Chandra Ghose v. Prankristo Dutt*, 3 B. L. R. O. C. 14; *Rajendra Dutt v. Sham Chand Mitter*, I. L. R. 6 C, 106].

§ 10. Examples of repugnants conditions.—Where a testator devised absolutely certain house and premises with all the household furniture to the children of his deceased daughter, E. W., and directed that the same should not be disposed of "until the youngest of my said late daughter's children surviving shall attain the age of eighteen years," it was held, this was an absolute gift and was not to be controlled by such directions which must be regarded as repugnant to the interest created [*Administrator General of Madras v. Money*, I. L. R. 15 M., 448. See *Kannu Pillay v. Chellathammal*, 10 Mad. L. J. 203; *Yethirajulu Naidu v. Mukunthu Naidu*, I. L. R. 28 M., 363, 374; 15 Mad. L. J. 299]. But where a testator devised his property to four persons in equal shares, of whom one was a minor, and directed that, "so long as my infant grandson (one of the four devisees) shall not have attained majority, the whole of my estate shall remain undivided," it was held that though the devisees took absolute interests in the shares, the estate became divisible on that infant grandson attaining majority [*Elookasi Dassee v. Durpa Narain Bysack*, I. L. R. 5 C., 59].

Where a testator gave his plantations in Assam, and all other his estate, to the plaintiff absolutely subject to the payment of his debts, and, after appointing her his executrix, declared, "on any sale by the plaintiff of the said

plantations, I will and direct her to pay my brother the sum of 1,000*l.* out of the proceeds of such sale, also the further sum of 500*l.* out of the proceeds of such sale to" the testator's sister,—it was held that the direction to pay these legacies was repugnant and void. In delivering the judgment of the Court Mr. Justice Chitty said :—"It appears to me that the testator has attempted to create a new kind of estate unknown to the law. The owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think, repugnant and void" [*In re Elliot; Kelly v. Elliot* (1896) L. R. 2 Ch. 353].

§ 11. Where condition restraining alienation is not repugnant.—It does not, however, follow that every clause or condition restraining alienation is either repugnant or void. A clause against

Exception. *

alienation is void only where the testator has expressed an intention to pass the estate; but where such clause is confirmatory of the other part of the will which indicates that the testator is not going to give away the estate, it is not void [see *Shookmoy Dass v. Monohari Dassee*, I. L. R. 11 C., 684; *Vullubhdas Damodhar v. Thucker Gordhandas Damodhar*, I. L. R. 14 B., 360].

Similarly, where some of the terms of a will seem to favour the view that the gift is absolute, but other words which occur subsequently plainly show only a life interest was intended to be given, the last mentioned words instead of being regarded as repugnant, will be construed as cutting down the effect of the former words, so as to lead to the conclusion that a life estate only was conferred [*Somasundra Mudaliar v. Ganga Bissen Soni*, I. L. R. 28 M., 386. But see *Amarendra Nath Bose v. Surudhani Dass*, 14 C. W. N. 458 and Comp. N. R., *Anthipuram v. N. Appasawmi*, (1909) 20 M. L. J. 99].

The words "from generation to generation" generally confer an absolute interest [*Arumugum v. Ammi Ammal* (1863) 1 M. H. C. R. 400]. But where the gift was to three persons R. V. and K. to be enjoyed by them "from generation to generation" ("*egopithu*") "*harmoniously*," without any power of gift, or sale, followed by a gift of an absolute interest to K. only, it was held that the former was not an absolute one [*Anthipuram v. Appaswami*, *supra*; but see *Bhaira v. Parameshori Dayal* (1884) I. L. R. 7 A. 516]. See *ante* sec. 71 (S) § 2.

§ 12. Condition restraining alienation to a limited extent.—But though a condition restraining alienation generally, is repugnant and void, yet it may be good if the restraint is confined to the alienation of the property to a particular person, or before a particular time (1). The question, therefore, arises, what is the exact line between conditions in restraint of alienation which are void and those which are valid? *In re Macleay* [L. R. 20 Eq. 190], Jessel, M. R., said: "the test is whether the condition takes away the whole power of alienation substantially; it is a question of substance and not of mere

* There is another exception to the general rule. Property devised to the separate use of a married woman may be made subject to a restraint on alienation, technically called *Anticipation*. In such a case any disposition by her during the continuance of the marriage is absolutely void. See sec. 4 and sec. 78, Indian Succession Act.

(1) Wms. 1272; 2 Jarm. 16—19, 4th Edn.

form ;" and he added :—" You may restrict alienation in many ways. You may restrict it by prohibiting a particular class of alienation, or you may restrict it by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time." Thus the question seems to be narrowed to this,—whether the restraint is partial or conditional, or whether it is absolute, taking away the whole power of alienation substantially, so that, in the result, it comes to this, that, if such restraint is partial the condition is valid, and if absolute, it is void (1).

Accordingly, where a testator devised his lands to his two daughters A. and W. absolutely, and provided that in case the said daughters,

Illustrations.

or either of them, should have no lawful issue, then they or she should have no power to alienate her share *except to her sister or sisters or to their children*, it was held by Lord Ellenborough, that the condition was good and valid [*Doe d. Gill v. Pearson*, 6 East. 173]. Similarly, a condition not to sell out of the family was held good [*In re Macleay* L. R. 20. Eq. 186; but see *Attwater v. Attwater*, 18 Beav. 330]. But a condition not to alienate except to one person, G. S., was held to be bad: "for then the feoffer (a) may restrain from aliening to any but himself, or such other person *by name* whom he may well know cannot nor never will purchase" [*Muschamp v. Bluet*, Bridg. 137; *Attwater v. Attwater*, *supra*]. The devisee may also be restrained from alienating for a particular reasonable time [*Lorge's Case*, 2 Leon. 82] (2). Thus it seems to be established that, in devising an absolute estate, on the principle that a restraint which does not substantially take away all power of alienation is good, a condition restraining alienation to a limited extent, such as the devisee shall not alienate to a particular person, or sell out of his family, may be imposed (3). As to restrictions against alienations in perpetuity, see sec. 101 (S). *ante*.

§ 13. Absolute by adverse possession.—A limited estate conferred by a will cannot be enlarged into an absolute one by 12 years' adverse possession, if such will happen to be inoperative. In *Dalton v. Fitzgerald* [(1897) 2 Ch. D. 86, at 93], Lopes. L. J., says: "if a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question; and if he remain in possession till twelve years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed" [*Rajah Venkata Narasinha Appa Rao v. Rajah Surenani Venkata Purushothoma Jagannadha Gopala Row*, 1. L. R. 31 M., 321; 18 Mad. L. J. 409].

§ 14. Absolute by power of appointment.—A gift to a person for life followed by a general power of appointment and a gift in default of

(a) "Feoffer"—*feoffment* is a mode of conveyance at Common law. It was originally used for the transfer of feudal ownership in possession, of land. Delivery of possession, is the essential characteristic of a conveyance by feoffment. Transfers by feoffment are not in much use now. The person who makes a feoffment, i.e., the transferor is called the "feoffer" (or feoffer); and the transferee or he to whom it is made, is called the "feoffee" (4).

(1) 2 Jarm. 16—19, 4th Edn.; Act IV of 1882, sec. 10, by Shep. & Bro.

(2) Shep. T. 130.

(3) 2 Jarm. 16—18, 4th Edn.; Theob. 426, 3rd Edn.; Shep. T. 130; Edw. L. of Pro. 54, 332.

(4) Shep. T. 203; Edw. L. of Pro. 344; Wharton, L. Lex.

appointment to that person's personal representatives, confers an absolute interest. In such a case the absolute interest is derived by the donee appointing himself, the power being a general one (1).

§ 15. Repugnancy and inconsistency.—The doctrine of repugnancy is based on the principle that, one cannot both give and withhold at the same time. If, for instance, one give an interest in property with all its incidents, and at the same time withhold or sever from it some of those incidents, the gift will be void being repugnant. Hence, legal incidents being inseparable from estates, *repugnancy* involves the idea of illegality. A clause or a condition is repugnant, because it is illegal, being prohibited by law; so that, a bequest saddled with the condition that its subject-matter shall devolve on male descendants only is void, as being a condition making property inheritable otherwise than in accordance with the law [*Tagore v. Tagore*, 9 B. L. R. 377; *Tarokeswar Roy v. Shoshi Shikhareswar Roy*, I. L. R. 9 C., 952; L. R. 10 I. A. 51]. But *inconsistency*, though resembling repugnancy, is something which is apart from illegality, as where a testator by the first clause of his will gives his property to A. and by the last clause gives it to B. (see sec. 75 (S), *ante*). Here, the giving of the property to B. is not anything which is prohibited by law; but if the gift to A., being absolute, had been clogged with the condition that A. should not alienate it, or partition it, or build upon it, such condition being what the law prohibits, would be repugnant. Again, repugnancy is void, but inconsistency is not necessarily to be regarded as void; repugnancy is irreconcilable, but inconsistency may be reconciled.

§ 16. "Fund," what it implies.—Although the word "fund" is used in the section and the illustration is in keeping with it, the rule embodied in it, seems to be intended to be applicable to all classes of legacies comprising moveable or immoveable property [see *Mookundo Lall Shaw v. Ganes Ch. Shaw* (1875) 1 C., 104; *Anantha v. Nagamuthu* (1881), 4 M., 200].

67. [126 (S)].—Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him, as if the Will had contained no such direction.

Direction that a mode of enjoyment of absolute bequest is to be restricted, to secure a specified benefit for the legatee.

Illustrations.

(a) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life, and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(b) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund, and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 3. *Illustrative cases.*

§ 2. *In what the difficulty consists.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the wills of Hindus, Jains, &c.

§ 1. **The section.**—This section contemplates cases in which there is first a bequest absolute in form, and then a revocation or qualification of it for purposes which fail. As to such bequests, the rule is, that, “if a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee’s enjoyment of it to secure certain objects for the benefit of the legatee — upon failure of such objects, the absolute gift prevails [*Campbell v. Brownrigg*, 1 Phill. 301] (1). But if there is no absolute gift, as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator’s estate, as not having, in such event, been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator’s estate, but already the property of the legatee” [Lord Cottenham, in *Lassence v. Tierney*, 1 Mac. and G. 551] (2). See section 127 (S) *post*.

In *Palmer v. Flower* [L. R. 13 Eq. 250] (3), the legacy was of a sum to be expended in the purchase of a commission in the army, and, on the purchase of the commissions in the army being abolished by royal warrant, it was held that the legatee was entitled to the sum given. Here the purpose became incapable of execution.

Mr. Justice Henderson says: “If the main object of a gift is to benefit

Mr. Justice Henderson’s views.

the person who is to take and no other person is interested in the bequest, in that case if the gift cannot be applied to the purpose specified, or if the legatee prefers to have it otherwise applied, he has the option of saying that, although the testator has expressed his desire that the benefit is to be conferred in a particular form, he does not wish to have it in that manner, and may ask the Court to give him the property. On the other hand, where the object is not solely for the benefit of the legatee, but some other purpose also is expressed by the testator independent of the object of benefiting the legatee, the principle laid down in the case of *Lassence v. Tierney* (*supra*) does not apply, and the legatee is not entitled to elect. In *In re Skinner’s Trusts* (1 J. and H. 102) the case was on the border line between these classes of cases. There the

(1) Wms. 1294.

(2) Wms. 1294; 1 Jarm 827, 3rd Edn.; 872, 4th Edn.; 880, 5th Edn.; Theob. 430, 5th Edn.

(3) Henderson 266; 1 Jarm. 398, 4th Edn.; 369, 5th Edn.

testator bequeathed certain manuscript books to trustees for his grandson 'that he may provide for the said books being published to the best advantage for the interests of the said child, so as to contribute towards a fund to assist him when he goes to College,' and also bequeathed £1000 towards the printing. It appeared that it was impossible to publish the books at a profit, and the Court held that the grandson was entitled to the £1000, on the ground chiefly that the primary intention was to benefit the legatee" (1).

§ 2. In what the difficulty consists.—The difficulty in these cases lies in ascertaining, whether there is an absolute gift in the first instance or not (*i. e.* whether the gift to the primary legatee is absolute or qualified). The question is whether the original gift is qualified by the words in which it is given [*Lassence v. Tierney*, 1 Mac. & G. 551]; or whether there is an independent gift, with a direction as to the mode of its enjoyment [*Campbell v. Brownrigg*, 1 Phill. 301] (2). The intention is, of course, to be collected from the whole will; and the rule is, that, "where the gift is in terms ambiguous, other parts of the will are to be looked at to see what the testator's intention was; but if there is a distinct positive gift, and the intention is express, nothing that afterwards follows can affect the construction of the positive gift" [see *Campbell v. Brownrigg supra*] (3).

§ 3. Illustrative cases.—The following cases seem to be in point:—

Whittell v. Dudin. Where a testator directed the residue of his property to be equally divided between his wife, and sons and daughters, subject, as to the shares of the daughters, to certain trusts for the benefit of themselves, and their children, Sir T. Plumer, M. R., held, "that a daughter dying without a child, was entitled absolutely under the original bequest, from which it was to be collected that the testator's design was to make an equal division among the children, which would be frustrated if the shares of daughters were to go to the testator's next of kin as undisposed of property, on their dying without children" [*Whittell v. Dudin*, 2 J. and W. 279] (4).

Similarly, in *Hulme v. Hulme* [9 Sm. 644] (5), where a testator, in the first instance, made an absolute gift to all his children by his second wife, who should be living when the youngest should attain 21, and added a direction for settling the shares of the daughters, upon trust for them for life, and then for their children, and one of the daughters died childless, it was held that the share of such daughter belonged absolutely to her representatives. Sir Shadwell, V. C., observed, "The absolute gift remains, except so far as the direction for settling the shares of the daughters has taken it away, and it is not taken away in the case of a daughter dying without having children."

A testatrix by her will directed that her daughter Ruse should enjoy the rents and profits of certain immovable property for her life, and after her death the said property should be sold, and the sale proceeds divided equally between her two sons S. and J. She further directed that J's share of such proceeds should be held in trust by her executors and invested in government securities,

(1) Hend. 266.

(2) 1 Jarm. 827, 3rd Edn.; 872, 4th Edn.; 830, 5th Edn.; Theob. 430-31, 5th Edn.

(3) 1 Jarm. 827-28, 3rd Edn.; 872, 4th Edn.; 831, 5th Edn.

(4) 1 Jarm. 871, 4th Edn.; 829, 5th Edn.; 826, 3rd Edn.

(5) 1 Jarm. 871, 4th Edn.; 829, 5th Edn.; 826-27, 3rd Edn.

the interest of which should be applied to J's maintenance, and that in case J. should die leaving a widow or issue, his share should go to them as he should devise or bequeath. Then the will provided that "should my said son J. reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son J. for his absolute use the whole of the amount which he may be entitled to * * * *, or such part or parts thereof as to my executors may appear proper." It was held by Candy, J. that J's interest in the share of the sale-proceeds was a life-interest subject to the contingency of the executors in their discretion handing over the *corpus* of the share, or part thereof, for his absolute use. His Lordship said: "Testatrix did not simply bequeath J.'s share to him for his maintenance and then stop, but she bequeathed to him his share and directed that the mode of enjoyment by the legatee should be restricted to a life interest with power to the executors under certain circumstances to give him the *corpus* for his absolute use, and with power to J. to appoint to his widow or issue" [*Bechar Akha v. P. DeCruz*, I. L. R. 19 B., 221; confd. *Ibid.* 770].

In *Haliburton v. Administrator General of Bengal* [I. L. R. 21 C., 488] the testator devised his estate, should his wife remain his widow, for the general benefit of his wife and her children living, and any other children to be born to him of his said wife before or after his death. He also provided that should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her life-time, but that after her death her children and their descendants should take *per stirpes*; and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage and without children and under age, his wife should take half of his estate and the testator's brother the other half, and in the event of the brother dying without children, the testator's wife should take the whole estate.

The testator's wife remained his widow until her death, her children having all predeceased her without being married.

The question was whether there was an absolute gift of the estate to the widow and children jointly, with certain restrictions as to the mode of enjoyment of the gift, or whether it was a gift of a life estate only to the widow with remainder to her children and their descendants.

Sir W. Comer Petheram, C. J. in answering the 1st question in the affirmative, said: "It is, I think, impossible to suppose that he (testator) intended to give the ultimate estate to his widow if she married again and to deprive her of it if she remained his widow, and consequently I think that, reading the will altogether it appears that it was his intention by the first devise to give the estate to his wife and children jointly, and that what follows was merely intended to restrict the mode in which they should enjoy it." [Reference was made to *Lassence v. Tierney*, 1 M. and G. 551].

68. [127 (S)].—Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the Will, remains a part of the estate of the testator.

Bequest of a fund for certain purposes, some of which cannot be fulfilled.

Illustrations.

(a) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children. The son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(b) A bequeaths the residue of his estate to be divided equally among his daughters with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

See sec. 126 (S) § 1, *supra*, and compare illustrations (a) and (b) of this section with illus. (b) and (a) of that section respectively.

NOTES AND COMME

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| § 1. <i>Precatory trust.</i> | § 6. <i>Secret trust.</i> |
| § 2. <i>The principle.</i> | § 7. <i>Object of secret trusts.</i> |
| § 3. <i>The current changed.</i> | § 8. <i>Communication and acceptance.</i> |
| § 4. <i>Essentials of precatory trust.</i> | § 9. <i>Trust partially disclosed.</i> |
| § 5. <i>Words held sufficient to raise a precatory trust.</i> | § 10. <i>A distinction.</i> |

Extent of the section.

This section applies to the Hindus, Jaines, &c., and also to the Parsees.

§ 1. Precatory trusts.—There is no separate head or chapter dealing with precatory trusts; but inasmuch as, such trusts are created by words similar to bequests with directions as to application or enjoyment, it seems proper that they should find a place here. Precatory trusts belong to the class of implied trusts, and usually occur in wills, and arise when a testator makes a bequest and accompanies it with words expressing a wish, request, recommendation, &c., that the legatee will dispose of the subject-matter of the bequest in favour of another. [See *Greedharee Doss v. Nando Kisore Doss*, 11 Moo. I. A. 504; 8 W. R. P. C. 25]. The words expressing a wish, request, &c. which are addressed to the devisee or legatee, make such devisee or legatee a trustee for the person in whose favour those words are used (1).

“If a testator expresses a wish only with respect to the application of property, without imposing a command or creating a trust, it is probable that

(1) 1 Jarm. 385, 4th Edn.; Edw. L. of Prob. 178—79.

in most cases he intends to leave the parties at liberty to carry out his wishes or not, as they may think fit; or at least to impose only a moral, and not a legal obligation. The Courts, however, lean to the construction which regards the testator's wishes as meant to be imperative on those to whom they are addressed." Hence the rule is, as indicated above, that the expression of wish, &c., is *prima facie* considered as obligatory, and creates a trust unless an intention appear to the contrary [*Malim v. Keighley*, 2 Ves. Jr. 333; *Knight v. Boughton*, 11 Cl. and F. 513; *Briggs v. Penny*, 3 De G. and Sm. 525]. If, for instance, a testator give Rs. 1000 to A. B., desiring, wishing, recommending, or hoping, that A. B. will at his death give the same sum or any portion thereof to C. D., it will be considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. [*Knight v. Knight*, 3 Beav. 148; S. C. nom. *Knight v. Boughton*, *supra*] (1).

§ 2. The principle.—The principle of precatory trusts has been very beautifully expressed by Muttusami Ayyer, J., in *Administrator General of Madras v. Lazar* [I. L. R. 4 M., 244]. In that case the testator directed that a debt due to him by his brother-in-law should not be claimed, demanded or enforced, but that his wish was that, that sum should be specially devoted to the education of the children of his said brother-in-law. In a suit by the Administrator-General, the question being whether that debt was released by the testator or it was bequeathed in trust for the education of his brother-in-law's children, that learned judge expressed himself in these words: "From the cases cited in *Knight v. Knight* (*supra*), it will be seen that, as a general rule, when property is given absolutely to any person and that person is by the giver recommended, entreated, requested, or wished to dispose of that property in favour of another, the recommendation, entreaty, request or wish is held imperative, and, therefore, to create a trust. But this rule does not apply when it appears clearly from the context that the first taker is in any way to have an option to control or defeat the desire expressed [*Malim v. Keighley*, *supra*]. The principle is, that the question is one of construction as to the intention of the testator, and that the term 'wish' imports a trust, unless the context shows that a discretionary power is given to withdraw any part of the fund from the object of the wish" [see *Mussoorie Bank v. Raynor*, I. L. R. 4 A., 500; L. R. 9 I. A. 70; *Greedharee Doss v. Nanda Kisore Doss*, 11 Moo. I. A. 405; 8 W. R. P. C. 25; *Curtis v. Rippon*, 5 Mad. 434; *House v. House*, 23 W. R. (Eng.) 22; *Johnston v. Rowlands*, 2 DeG. and Sm. 356; *Re Hamilton*; *Trench v. Hamilton* (1895) 2 Ch. 370; *Re Williams*; *Williams v. Williams*, (1897) 2 Ch. 12 at 14; *Hill v. Hill*, (1897) 1 Q. B. 483, at 487] (2).

§ 3. The current changed.—The rule as to precatory trusts, seems of late, to have changed its current. Formerly a gift, simply by the fact that it is accompanied by a desire, wish, recommendation, or hope, would, in the absence of anything to the contrary, create a precatory trust [see *Malim v. Keighley*, *supra*; *Knight v. Knight*, *supra*]. But now it is settled that these words alone are not sufficient to create a trust, unless, a contrary intention can be gathered from the context [see *supra*, *Hill v. Hill*; *Re Hamilton*; *Trench v. Hamilton*]. So it has been laid down that words expressing wish only, unless such words are imperative and imply a command, will not create a precatory trust [*Kumara Sami v. Subbaraya*, I. L. R. 8 M., 325; see *Natha v. Dhunbaiji*, I. L. R. 23 B., 1; *Mussoorie Bank v. Raynor*, I. L. R. 4 A., 500]. In the case last cited, their

(1) Hawk. 159.

(2) 1 Jarm. 389, 391, 4th Edn.; Theob. 433, 5th Edn.; Hawk. 163.

Lordships of the Privy Council said: "The current of decisions now prevalent for many years in the Court of Chancery shows, that the doctrine of precatory trusts is not to be extended." Where, therefore, a testatrix declared—"I desire M. S. K., to pay every month Rs. 644-1-7 to my dependants and personal servants, as detailed below," it was held that these words (coupled with others) did not constitute a precatory trust [*Suleman Kadar v. Dorab Ali Khan*, I. L. R. 8 C., 1. at 5; L. R. 8 I. A., 117].

So where the testator gave to his wife absolutely all his property, "in full confidence that she will make use of it, as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces"; it was held that, these words did not constitute a precatory trust, and that the widow was entitled absolutely for her own benefit [*Hanbury v. Fisher*, (1904) 1 Ch. 415; see *In re Oldfield: Oldfield v. Oldfield* (1904) 1 Ch. 549]. But where a testatrix after giving a legacy of £2,300 to R. declared by her first codicil "I wish R. to use £1,000 * * * for the endowment in his own name of a cot in a hospital and to retain the balance for his own use and benefit"; and then by another codicil added these words—"I wish R. after endowing a cot as provided by my first codicil, to use the balance * * for such charitable purposes as he shall in his absolute discretion think fit;" it was held, that a valid precatory trust was created in favour of charity by both the codicils [*In re Burley; Alexander v. Burley* (1910) 1 Ch. 215].

The rule to be observed in such cases is thus laid down by Mr. Justice Romer: "In considering whether a precatory trust is attached to any legacy, the court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed [see *In re Hamilton* and *In re Williams*, *supra*]. In *In re Conolly: Conolly v. Conolly* [(1910) 1 Ch. 219], Joyce, J. summed up the decisions in regard to precatory trusts in the following words: "Where in a will words of gift are used, which by themselves are sufficient to give the legatee, devisee or donee the whole property in the subject-matter of the gift, then the interest of that devisee or legatee will not be cut down to a trust estate or life-estate with a trust for disposal after the determination of the life, by the mere expression of a desire such as 'I desire that the property be left by the donees to some charitable purposes' or to some body else'."

Hence, if it appears to be clear, that the testator intended that the devisee should take absolutely, precatory words will not cut down the absolute gift and create a trust. In such cases the words expressing entreaty, request, &c. will be regarded merely as the expression of a wish, without imposing a trust [*Meredith v. Heneage*, 1 Sim. 542; *Wood v. Cox*, 2 My. and Cr. 684; *Webb v. Woods*, 2 Sim. N. S. 267; *Hill v. Hill* (1899) 1 Q. B. 483, at 487; *Re Jones; Richards v. Jones* (1898) 1 Ch. 438; *In re Conolly: Conolly v. Conolly* (1910) 1 Ch. 219] (1).

§ 4. Essentials of precatory trust.—It is essential, in order to create a precatory trust, that the property, the subject of the gift, as well as the object,

(1) 1 Jarm. 388-89, 4th Edn.; Theob. 433-35, 5th Edn.; Hawak. 164; T. L. Lect. (1881), 80; Underhill. 133, 134, 137.

should be certain and well defined [*Mussoorie Bank v. Raynor*, *supra*; *Gakool Nath Guha v. Iswar Lochan Roy*, I. L. R. 14 C., 222; *Kumarasami v. Subbaraya*, I. L. R. 9 M. 325; *Lechmere v. Lavie*, 2 My. and K. 197; *Palmer v. Simmonds*, 2 Drew. 221; *Bernard v. Minshull*, Johns. 276; *Malim v. Keighley*, *supra*; *Williams v. Williams*, 1 Sim. N. S. 358; *Green v. Marsden*, 1 Drew. 647] (1). "The definite nature and *quantum* of the subject, and the indefinite nature of the object, are always used by the court as evidence that the mind of the testator was not to create a trust" [Lord Eldon, in *Morice v. Bishop of Durham*, 10 Ves. 536] (2). In *Kumarasami v. Subbaraya*, (*supra*), the words used by the testator, were, "you should give my brothers, their wives and children, according to your wishes." It was held, these words were not sufficiently imperative, and too uncertain and general to create an implied trust. "The words express a wish only and not a command, and though, they indicate the objects intended for the testator's benevolence, they are uncertain both as to the property and the way in which it shall go" (Parker J. citing Lewin on Trusts, Chap. VIII § 2). It is also essential that an intention to impose an obligation is clearly shown and the terms of such obligation are sufficiently definite [see *Comiskey v. Hanbury* 9 C. W. N xcvi; (1905) A. C. 84]; the question being allways whether the testator means to impose an enforceable trust as opposed to a mere expression of hope or desire insufficient to carry any interest or obligation. [*Re Conolly*; *Conolly v. Conolly* (1910) 1 Ch. 219; *Re Burley* (1910) 1 Ch. 215].

Upon the authority of modern decisions, the whole doctrine may be summed up in the following words:—In order that a trust may be held to arise from the use of precatory words, the court must be satisfied from the words used in the will, taken in connection with all the other terms of the disposition, "that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. Unless a gift to A. with precatory words in favour of B., is in fact equivalent in its meaning, intention and effect to a gift to A. 'in trust for B., then certainly no trust should be inferred." (3).

§ 5. Words held sufficient to raise a precatory trust.—

(a) **Words of confidence**, such as "trusting" [*Baker v. Mosely*, 12 Jur. 740; *Irvine v. Sullivan*, L. R. 8 Eq. 673]; "confiding" [*Griffiths v. Evans*, 5 Beav. 241]; "not doubting" [*Parsons v. Boller*, 18 Ves. 476], and "firm conviction" [*Barnes v. Grant*, 26 L. J. Ch. 92].

(b) **Words of request and entreaty**.—"Entreat" [*Prevost v. Clarke*, 2 Mad. 458]; "require and entreat" [*Taylor v. George*, 2 V. and B. 378]; "wish and request" [*Foley v. Parry*, 5 Sim. 138]; "dying request" [*Pierson v. Garnet*, 2 B. C. C. 37, 266]; "request" [*Eade v. Eade*, 5 Mad. 118]; "beg" [*Corbet v. Corbet*, I. R. 37, 226]; "dying wish" [*Godfrey v. Godfrey*, 11 W. R. (Eng.) 554]; "last will" [*Hinxman v. Poynder*, 5 Sim. 546]; "wish and desire" [*Liddard v. Liddard*, 28 Beav. 266]; "desire" [*Harding v. Glyn*, 1 Atk. 469].

(c) **Words of advice and recommendation**.—"Advise" [*Parker v. Bolton*, 5 L. J. Ch. 98]; "recommend" [*Tibbets v. Tibbets*, 19 Ves. 656; *Herwood v. West*, 1 S. and St. 387; *Ford v. Fowler*, 3 Beav. 146; *Malim v. Keighley*, *supra*].

(1) 1 Jarm. 391, 394, 4th Edn.; Theob. 435, 5th Edn.; Hawk. 164; T. L. Lect. (1881), 79.
 (2) T. L. Lect. (1881), 355; Hawk. 164.
 (3) Pomeroy, § 1016, 3rd Edn.

(d) **And other words** such as "*well knowing*" [*Briggs v. Penny*, 3 Mac. and G. 546]; "*hoping*" [*Harland v. Trigg*, 1 Bro. C. C. 142] or where the testator "*directs*" [*Griffiths v. Evans*, *supra*]; "*orders and directs*," [*Cary v. Cary*, 2 Sch. and Lef. 189]; "*most heartily beseeches*" [*Meredith v. Heneage*, 1 Sim. 553]; "*authorizes and empowers*" [*Brown v. Higgs*, 4 Ves. 708]; or "*is well assured*" [*Macey v. Shumer*, 1 Atk. 389].

§ 6. **Secret trusts.**—Here, it may not be out of place to take notice of what 'secret trusts' are.—All testamentary trusts must be evidenced by will or codicil; that is to say, they must be committed to writing. But 'secret trusts' form an exception to this rule. These are gifts by the testator upon a trust not committed to writing.

In order that a 'secret trust' may be validly constituted, it is necessary that the testator should, before or after the date of the will, communicate to the legatee his intention that he is to hold the gift in trust, and the legatee must also accept the trust or acquiesce in it by silence. This being so, a party setting up such a trust must prove affirmatively that it was communicated to the legatee or devisee and that the latter agreed to accept the gift on the terms proposed [*Kali Charan Ghosal v. Ram Chandra Mandal*, 1 L. R. 30 C., 783; *Louis Kunha v. Coelho*, 1 L. R. 31 M., 187; 18 M. L. J. 158; *Re Pitt-Rivers* (1902) 1 Ch. 403; see *Jones v. Badley*, L. R. 3 Ch. A. C. 362] (1).

Parol evidence is admissible to prove these facts (a).

(a) It is very clear that, to admit parol evidence to prove such facts and to give effect to them when proved, is to import matters in the will which are not written. This directly conflicts with section 50 (S) *ante*, which provides that no will shall be valid unless it is in writing and is executed in the manner prescribed therein. It is also clear that the trust so established cannot be admitted to probate, but yet it is enforceable as part of the testator's dispositions.

The foregoing which is apparently a violation of the Statutory rules, is justifiable on two grounds. The first is laid down by Lord Cairns in these words:—"Where a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than for his benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect; and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust and in such a case the Court will not allow the devisee to set up the Statute of Wills." This is so, because the devisee, by his conduct, has induced the testator to leave him the property, and as Lord Justice Turner says [in *Russell v. Jackson*, 10 Hare. 204], "no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favour would not have been found in the will." "But in this the Court does not violate the spirit of the Statutes: but for the same end, namely *prevention of fraud*, it engrafts the trust on the devise by admitting evidence which the Statute would in terms exclude in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it [*Jones v. Badley*, *supra*]. Briefly speaking, these trusts are enforced by the Court merely to prevent fraud on testators by the devisee or legatee acting in violation of their promise or undertaking". The principle is, the person making a promise to do something in itself not illegal, for a third party, is compelled to make good the promise by the Court holding him to be a trustee to the extent of his promise binding his conscience.

Where, however, there is no understanding or contract binding the conscience of the legatee he will not be a trustee. Thus if the secret communication is to the effect that the property should reach another destination through the voluntary act of the legatee in the exercise of his right of ownership, no trust will be implied [see *Geddis v. Semple* (1903) 1 Ir. R. 73].

(1) See Theob. 68, 5th Edn.; Rawson's L. Lex. 2nd Edn.; Edw. L. of Pro. 178; Mathews, Chap. XXXII.

In *Kali Charan Ghosal v. Ram Chandra Mandal*, (*supra*), the facts were these: One Kristomoni Dassi executed a will on the 29th March, 1881, and bequeathed her properties to her brothers I. and S.; S. died leaving a son L. and a daughter G.; on the 14th August, 1893, the testatrix executed a second will revoking the first (*i.e.*, the will of the 29th March, 1881), and bequeathing her properties to G. After Kristomoni's death, both I. and G. applied for Letters of Administration, and on the 3rd February, 1894, a compromise was effected by which G. was to receive 10 annas and I. 6 annas of the property left by the testatrix. Letters of Administration with the 2nd will annexed were then granted to G. on the 2nd March, 1894, and on the 22nd August of the same year G. sold to the plaintiffs certain lands by a registered deed of sale.

The defendants who dispossessed the plaintiffs pleaded in defence, that, in the will of the 14th August (the 2nd will) G. was only a *benamidar* for her brother, I., who was, and was intended to be, the real beneficiary; and that, by virtue of this will and of the compromise of the 3rd February, 1894, L. and I. who had become owners of 10 *as.* and 6 *as.* shares of the property, respectively, sold their shares containing the lands in dispute, to the defendants, by a deed dated the 28th August, 1894. In other words, the defendants' plea was, that there was a *secret trust*, and that G. was accordingly, a trustee for L. the real beneficial owner. In deciding the question whether it was open to the defendants to show that G. the universal legatee, as evidenced by the will, was really a trustee for L., Sir Francis Maclean, C. J., said [citing *Jones v. Badley*, L. R. 3 Ch. A. C. 362]: "There is no authority in India upon the subject, statutory or otherwise; and, in the absence of any such authority, I doubt if it be open to the defendants to adduce such evidence, unless we act in India upon the principle which, in cases of this class, is acted upon in the English Courts. In the English Courts it is open to those who claim the benefit of a secret trust to show that a gift by will, say to A, is really given to A. on a secret trust for B. But it is an undoubted element in that class of cases that the party setting up such a secret trust must show that the trust was communicated to A. by the testator, and that A. agreed to accept the property on those terms. If then we were to apply this English doctrine to Indian cases, we must apply the whole; and in the present case it is admitted that there was no evidence to show that any such trust was communicated to G, or that she accepted the property upon the terms of her being a trustee." (a) The point was thus decided against the defendants [*Kali Charan Ghosal v. Ram Chandra Mandal*, *supra*].

The second ground is that of contract.... For, the person to whom the testator communicates his wishes and who accepts and promises to act up to them, is held, in effect, to make a contract in consideration of the testator giving him the property [see *In re Maddock: Llewelyn v. Washington* (1902) 2 Ch. 220, 232].

(a) The view of Sir Francis Maclean, C. J., stated above, was not followed in *Louis Kunha v. Coelho* [I. L. R. 31 M., 187; 18 Mad. L. J. 158; see *Richard Taylor v. Raja of Parlakimedi*, 32 M. 443] in which it was held by Messrs. Justice Wallis and Sankaram Nair, that in this respect, the law in this country was the same as in England. In that case defendant's plea was that the testator left all his properties to the plaintiff with private instructions giving pecuniary legacies to certain parties and the bulk of the property to the church: and it was held on the evidence that a valid trust had been created, so that the plaintiff was merely a trustee for the persons named by the testator as beneficiaries in his private instructions. The rule of English law relied upon by their Lordships is summed up in the following words:—"If the heir or legal representative of a person competent to make his will undertakes to carry into effect his wishes that may be communicated to him and on the faith of that undertaking that person did not dispose of his property by will, then the Court

§ 7. Object of Secret trust.—The object of these trusts is, as the name imports, secrecy. In England, on the death of a testator his will becomes a public document, and it is deposited at Somerset House,* where any body can have a look at it for a shilling. This being so, those who object to the world knowing what they have done with their property, have recourse to the expedient of disposing of their property by means of secret trusts, whereby, as seen above, property is given to a devisee beneficially, on the secret understanding that he (the devisee) will hold the same on the intended trusts.

§ 8. Communication and acceptance.—Communication and acceptance, may be made verbally or in writing. Both to be made before the testator's death. The acceptance or promise to carry out the testator's wishes, may also be made expressly or tacitly. If the communication is made in writing it will be sufficient if the writing is placed in the legatee's hands in a sealed cover, and the legatee thereupon engages to hold the property upon the intended trust, without knowing the actual terms of it. But such writing will avail nothing if found after the testator's death [*In re Boyes*; *Boyes v. Carritt* (1884), 26 C. D. 527].

W. T., a testator, executed his will on the 19th April, 1892, devised and bequeathed all his property "that I may possess at the time of my death" to S. S. G. G., and appointed him his sole executor, and then declared "I have no doubt he will carry out my wishes." Subsequent to his death which occurred in January, 1902, a letter bearing date 28th April, 1895, and addressed to the said legatee, was found. This letter directed the legatee to convert the testator's property into money and remit the proceeds to R. T., the testator's brother, and contained an endorsement that it was to be opened after his death. It was not communicated to the legatee during the lifetime of W. T. The legatee proved the will and died in 1905. In a suit instituted by the next of kin of the testator for administration of the estate against the heir of the legatee, it was held that, the letter did not operate to create a trust in favour of R. T., and it was not admissible in evidence† [*Richard Taylor v. Rajah of Paralakimedi* (1900) I. L. R. 32 M., 443. *In re Boyes*, *supra*, distinguished. See *In re Bell* (1908) 99 L. T. 939].

will compel the heir or legal representative to carry into effect all such instructions as may have been given to him. So again, if a legatee promises the testator that upon the testator's leaving the property to him by a regular will, he will carry out all such wishes as are confided to him by the testator, and relying upon that promise the testator makes a will in his favour; or, if having made a will a person at any time before his death communicates the disposition to the legatee and states to him that he has not expressed in the will all his intentions which he confides to the legatee and that he depends on the legatee to carry them into effect, and the legatee either expressly assents to it or by his silence or conduct leads the testator to believe that he will abide by the instructions so communicated to him; then the legatee will be treated as a trustee and he will be compelled to carry out the instructions confided to him. The reason is that, but for such assent, express or implied, the testator would not probably have left the property to him, or the will, if made, might have been revoked. It would be fraud on his part not to give effect to the testator's intentions, and no man shall be benefited by his own personal fraud, and if the Statute * * * gives him the title, the Court fastens upon his conscience a personal obligation to carry into effect the wishes of the testator confided to him" [See *Walgrave v. Tedds* (1855) 2 K. and J. 313; *McCormick v. Grogan* (1869) 4 L. R. H. L. 82, at 88; *In re Boyes*; *Boyes v. Carrit* (1855) 25 Ch. D. 531; *Jones v. Badley* (1868) 3 Ch. 363; *In re Pitt Rivers*; *Scott v. Pitt Rivers* (1909) Ch. 408; *In re Maddock*; *Llewelyn v. Washington* (1902) 2 Ch. 220].

* Somerset House, Strand, London, is depository of wills of living persons for safe custody. See sec. 81 (P) F. n.; Ha. and Jar. 541.

† As to the admissibility of such letter in evidence the rule is thus laid down in *Lewin on Trusts*: "If a testator by his will devise an estate, and the devisee, so far as appears on

So where a testator bequeathed £300 to his house-keeper, and subsequent to the date of the will, gave her a cheque for the same amount and also an envelope enclosing a letter which she was directed to open only after his death; and it appeared that the contents of that letter, which had not been communicated to her during his life-time, were to the effect that she should tell his executors that they need not pay her the said sum of £300 left to her by the will, as he had already paid it to her by the cheque; it was held, that no trust was created, and the legatee was entitled to both the legacy and the gift. It was also held that the letter was not admissible to prove the intention of the testator, but that parol evidence was admissible to prove that the transaction was intended to be an ademption [*Re-Shields: Corbould-Ellis v. Dales* (1912) 1 Ch. 591].

If the communication is made to one only of two or more persons to whom the legacy is given as tenants in common, the promise or consent of such a one to carry out the testator's wishes, will bind him alone, the others taking their shares free from any trust. But if the gift is to them as joint tenants, a distinction is made as indicated below.

(1). If the gift is made upon the faith of the promise made by one before the date of the will, to whom the communication was made, all the devisees or legatees will be bound to carry out the trust.

(2). But if in such case the communication and the promise are made after the date of the will, that person alone to whom the communication was made, shall be bound, the other or others being at liberty to sever the joint tenancy, and take the gift free from trust [*In re Stead: Witham v. Andrew*, (1900) 1 Ch. 237, 240; see *Freeman v. Laing* (1899) 2 Ch. 359].

§ 9. **Trust partially disclosed.**—In cases where the knowledge that some trust is intended, is communicated to the legatee during the lifetime of the testator, but the terms of the trust are not disclosed till after his death, the trust fails. In such cases the legatee cannot take beneficially, for as laid down in *Briggs v. Penny* [(1851) 3 DeG. and S. 525, 557], "If a testator gives upon trust though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases * * * the legatee is excluded." [See *In re Boyes* (1884), 26 C. D. 531]. In cases, however, where the legatees are trustees upon the face of the will, but the terms of the trust are not set forth in detail, the trusts are not void, but may be rendered valid by disclosing the terms at or before the execution of the will [see *In re Fleetwood* (1880) 15 C. D. 594; *Johnston v. Ball* (1851) 5 DeG. and S. 85; *In re Huxtable* (1902) 2 Ch. 793]. This is so, because the principle is that a testator cannot appoint trustees and reserve the power of fixing the trusts at any later period, for that would be, in effect, making a testamentary disposition by a subsequent unattested paper [*Re Hetley* (1902) 2 Ch. 866; see *Johnston v. Ball, supra*]. See Lewin on Trusts, 60, 11th Ed.

§ 10. **A distinction.**—From the foregoing it will appear, there is a distinction between those cases in which it appears on the face of the will that a trust is intended, and those where the gift is absolute on the face of the will,

the face of the will, is intended to take the beneficial interest, and the testator leaves a declaration of trust not duly attested and not communicated to the devisee and assented to by him in the testator's lifetime, the devisee is the party entitled both to the legal and beneficial interest; for the estate was well devised by the will and the informal declaration of trust is not admissible in evidence" (Lewin, 59, 11th edn).

but a trust is secretly imposed on the legatee by communication and acceptance noted above. Strictly speaking, the latter are cases of secret trusts. In these cases, as already seen, parol evidence is admissible in support of the trust [*Jones v. Badley, supra*] although the will may show that the gift is not by way of trust [*Russell v. Jackson*, 10 Ha. 204; *Re Spencer's will*, 57 L. T. 519].‡

‡ But there is no express decision in support of this distinction [see *Rowbotham v. Dunnett*, 8 Ch. D. 430]. Theo. 69, 5th Edn.

The Hindu Wills Act.

[PART XVIII, ACT X, 1865].

—:O:—

OF BEQUESTS TO AN EXECUTOR.

69. [128 (S)].—If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy unless he proves the Will or otherwise manifests an intention to act as executor.

Legatee named as executor cannot take unless he shows intention to act as executor.

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor.

NOTES AND COMMENTARIES.

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|---------------------------------------|---------------------------------|
| § 1. <i>The English rule.</i> | § 5. <i>"Proves the will."</i> |
| § 2. <i>The section.</i> | § 6. <i>"Intention to act."</i> |
| § 3. <i>Application of the rule.</i> | § 7. <i>Miscellaneous.</i> |
| § 4. <i>"Manifests an intention."</i> | |

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees. It has not been extended to the Talukdars of Oudh.

§ 1. The English rule.—The law in England is, that a legacy to a person appointed executor is *prima facie* conditional on his accepting the office, and that it is excluded if any expression can be found implying an intention to benefit the person independently of the office imposed on him. "Nothing is so clear," said Lord Alvanley in [*Harrison v. Rowley*, 4 Ves 216], "as that if a legacy is given to a man, as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor." That is to say, he must either accept the office, or there must be unequivocal evidence of an intention to act as an executor [*Lewis v. Matthews*, L. R. 8 Eq. 277]. Formerly, the rule was, that an executor must prove the will in order to entitle himself to a legacy given him as executor; but now it is not absolutely necessary to prove the will, although *Harrison v. Rowley* (*supra*) is still the law [*Malins v. C.*, in *Lewis v. Matthews, supra*] (1).

(1) Hawk. 309, 310; Walker and Elg. 202, 203; Theob. 317, 5th Edn.; Wms. 1287, 1291, F. n; Hend. 274.

§ 2. The section.—This section follows the above rule, which seems to have been embodied in it. There is, however, this difference that the English rule is based upon the presumption that a legacy to a person appointed executor is given to him in that character; but this section leaves no room for any such presumption. The language of this section is peremptory; and “it is not left to the Court to decide whether the legacy was given to the person named in his character as executor. It is assumed that it was so given, and the prohibition follows” [Macpherson J., *In Prosanna Coomar Ghose v. Administrator General of Bengal*, I. L. R. 15, C., 83].

§ 3. Application of the rule.—The rule will apply although the legacy be not given to the person *as* executor, but by name and description. In *Reed v. Devaynes*, (3 Bro. C. C. 95), the testator gave legacies to certain persons by the description of “my very good friends,” and in the further part of the will, desired them to act as executors. One of these persons, who had not proved the will, or acted as executor, claimed his legacy. But Lord Alvanley said, that an executor so appointed, could not claim his legacy without acting, or at least proving the will [see *Prosanna Coomar Ghose v. Administrator General of Bengal supra*]. So it applies although equal legacies be given, to the executors, and to other persons not executors [*Calvert v. Sebbon*, 4 Beav. 222]. Generally speaking, the rule applies to all gifts to a person named an executor by the will, whether intended to be for his care and trouble or given to him as an executor or not, even if such person is incapable by bodily or mental infirmities, or on account of extreme old age, of proving the will or performing the duties of an executor [*Hanbury v. Spooner*, 5 Beav. 630] (1). But such incapacity will make no difference in the rule [*Ibid*; *Re Hawkins' Trust*, (1865) 33 Beav. 570].

So a legacy given to an infant executor is payable only on his accepting the office on arriving at majority, and will not carry interest from the testator's death [*Re Gardner*, 67 L. T. 552 (1893)].

But in England, where a legacy was given “to my friend and partner, J. P.” [*Cockerell v. Barber*, 2 Russ. 585], or “to my friend J. S. banker's clerk and one of the executors of this my will” [*In re Denby*, 10. W. R. Eng. 115], it was held, that the legacy was not annexed to the office, and the rule did not apply. So where the legacy was given to the executors, as a mark of the testators' respect for them [*Burgess v. Burgess*, 1 Coll. 367; see *Dix v. Reed*, 1 S. and Stu. 237] (2)a.

§ 4. “Manifests an intention.”—The intention must be manifested unequivocally (3). Giving directions about the funeral of the testator, and paying certain sums for burial fees, have been held to amount to such a

(a) It will appear from the foregoing that, since there can be no condition without a motive, it is only in cases where the gift is made for the care and pains of the executor, that such gift is considered to be conditional, whereas, when it is one of respect, admiration or affection, the idea of a condition is overturned. So it has been said that, “there can be no condition in the case of a gift to a person under designation of an office or post, that he shall assume the same, if it does not appear that the testator is interested in having the legatee assume it, for there would be no motive for the conditions” (4).

(1) Wms. 1287; Theob. 317, 5th Edn.; Hawk. 310; Hend. 274; Walker and Elg. 203.

(2) Hawk. 310, 311; Wms. 1288-90; Walker and Elg. 205.

(3) Wms. 1290.

(4) Bigelow 266-67.

manifestation [*Harrison v. Rowley*, 4 Ves. 202; *Prosanna Coomar Ghose v. Administrator General of Bengal*, I. L. R. 15 C., 83] (1). See 'intermeddling,' sec. 45 (P) § 7 *post*.

Where an executor to whom a legacy was left for his trouble, being in Australia at the death of the testator, sent home a general power of attorney, under which another person administered the estate, and the executor then died without proving the will, it was held that he had sufficiently manifested his intention to act under the trusts of the will to entitle his representatives to the legacy [*Lewis v. Matthews*, I. R. 8 Eq. 277] (2). On the same principle, where a testator bequeathed his residuary estate to A., the executor and trustee of his will, with a gift over in case of the death of A., and A. proved the will, but died before he had fully performed the trusts, it was held by Sir L. Shadwell, V. C., that A., by merely proving the will, entitled himself to the residue absolutely [*Hollingsworth v. Grassett*, 15 Sim. 52]. So where a bequest was made to an executor for his trouble and as a token of regard, and the executor died some months before the testatrix without having acted, it was held that he was entitled to the legacy, "no refusal or neglect to act, where necessary, appearing" [*Brydges v. Wotton*, 1 Ves. and Beam. 134] (3).

In *Prosanna Coomer Ghose v. Administrator General of Bengal* (*supra*), the will, after appointing executors, provided for a legacy to the plaintiff in these words: "My friend Prosanna Coomer Ghose, whom I appoint executor, shall get Rs. 5000 from my estate." The plaintiff did not prove the will, but it was found that he unequivocally manifested an intention to act sufficient to entitle him to the legacy, and his claim was accordingly decreed. In delivering the judgment of the Court Macpherson J. observed: "As the plaintiff has not proved the will, the question arises whether he has manifested an intention to act as executor. The proving of the will, when a person is in a position to prove it, is of course the best manifestation of his intention, and, if he failed to prove it, the Court would require a very strong reason for the omission before finding that the intention existed." In conclusion, his Lordship said: "I have no doubt that he (the plaintiff) was always ready and willing to act, and it is proved that after the testator's death he made arrangements for the cremation and *sradh*, or borrowed or advanced the money which was necessary for those purposes."

§ 5. "Proves the will."—The executor may prove the will at any time before the estate is fully administered (4) in order to entitle himself to the legacy [*Hollingsworth v. Grassett*, *supra*; *Harrison v. Rowley*, *supra*; *Lewis v. Matthews*, *supra*] (5). He may prove even after renunciation [*Angermann v. Ford*, 29 Beav. 349] (6).

§ 6. "Intention to act."—Intention to act as executor must be *bona-fide*; for, if the executor acts fraudulently, the mere taking out probate, or otherwise acting, will not entitle him to the legacy. Thus where one M, one of four executors, having had a legacy and an annuity given him by the testator, concurred in the probate, and shortly afterwards eloped with and married abroad, the infant daughter of the executor who was beneficially interested under

(1) Wms. 1291.

(2) Wms. 1291, F. n.; Walker and Elg. 203; Theob. 269, 3rd Edn.

(3) Wms. 1291, F. n.; Walker and Elg. 204.

(4) As to what is *fully administered* see sec. 45 (P) *post*.

(5) Theob. 317, 5th Edn.

(6) Walker and Elg. 204.

the will, and it appeared that he never acted as executor, but on the other hand, his sole object in concurring in the probate, was not to act, but to violate his trust in the grossest manner, it was held that he was not entitled to the legacy or the annuity [*Harford v. Browning*, 1 Cox. 302] (1).

§ 7. **Miscellaneous.**—In England, the above mentioned (§ 2, *supra*) presumption does not arise if the bequest is of residue
 The rule applies to bequests of residue. [*Griffiths v. Pruett*, 11 Sim. 202] (2). Therefore, regard being had to the fact that this section leaves no room for any presumption [*Prosanna Coomer Ghose v. Administrator General of Bengal*, *supra*], it seems, there cannot be any reason for holding, that this rule does not apply to a bequest of the residue in this country.

Sir Whitley Stokes suggests that, in bequests to executors the following form should be adopted, so as to prevent any question arising as to the sufficiency of manifestation of intention to act :—

“I hereby, appoint A. B. C. executors of this my will, and bequeath to each of them who shall prove my will the sum of Rs.—” (3).

(1) Wms. 1292; Walker and Elg. 204; Theob. 317, 5th Edn.

(2) Hawk. 310; Theob. 318, 5th Edn.; Wms. 1287.

(3) Stokes, 105.

The Hindu Wills Act.

[PART XIX, ACT X, 1865].

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OF SPECIFIC LEGACIES.

70. [129-(S)].—Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Illustrations.

(a) A bequeaths to B—

"The diamond ring presented to him by C."

"His gold chain."

"A certain bale of wool."

"A certain piece of cloth."

"All his household goods, which shall be in or about his dwelling-house in M. Street, in Calcutta, at the time of his death" (1).

"The sum of 1,000 Rs. in a certain chest" (2).

"The debt which B owes him" (3).

"All his bills, bonds, and securities belonging to him, lying in his lodgings in Calcutta."

"All his furniture in his house in Calcutta."

"All his goods on board a certain ship then lying in the River Hooghly."

"2,000 rupees which he has in the hands of C" (4).

"The money due to him on the bond of D" (5).

"His mortgage on the Rampore Factory."

"One-half of the money owing to him on his mortgage of Rampore Factory" (6).

"1,000 rupees, being part of the debt due to him from C."

"His capital stock of 1,000*l.* in East India Stock" (7).

"His promissory notes of the Government of India, for 10,000 rupees in their 4 per cent. loan."

"All such sums of money as his executors may, after his death, receive in respect of the debt due to him from the insolvent firm of D and Company."

"All the wine which he may have in his cellar at the time of his death" (8).

"Such of his horses as B may select" (9).

"All his shares in the Bank of Bengal."

"All his shares in the Bank of Bengal which he may possess at the time of his death."

"All the money which he has in the 5½ per cent loan of the Government of India."

"All the Government securities he shall be entitled to at the time of his decease" (1).

(1) See Wms. 1178.

(2) See Wms. 1166.

(3) See Wms. 1165, 1166, 1173.

(4) See Wms. 1166.

(5) See Wms. 1174.

(6) See Wms. 1173.

(7) See Wms. 1172.

(8) See Wms. 1172, 1164.

(9) See Wms. 1166.

(10) See Wms. 1172, 1164.

Each of these legacies is specific.

(b) A, having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell" for the benefit of B (1).

The legacy is specific.

(c) A having property at Benares and also in other places, bequeaths to B all his property at Benares.

The legacy is specific.

(d) A bequeaths to B—

"His house in Calcutta."

"His zemindary of Rampore."

"His taluk of Ramnagore."

"His lease of the Indigo factory of Salkya."

"An annuity of 500 rupees out of the rents of his zemindary of W."

"A directs his zemindary of X to be sold, and the proceeds to be invested for the benefit of B.

Each of these bequests is specific.

(e) A by his will charges his zemindary of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zemindary to D (2).

Each of these bequests is specific.

(f) A bequeaths a sum of money—

"To buy a house in Calcutta for B."

"To buy an estate in Zillah Furreedpore for B" (3).

"To buy a diamond ring for B" (4).

"To buy a horse for B"

"To be invested in shares in the Bank of Bengal for B."

"To be invested in Government securities for B."

A bequeaths to B—

"A diamond ring."

"A horse."

"10,000 rupees' worth of Government securities."

"An annuity of 500 rupees" (5).

"2,000 rupees to be paid in cash" (6).

"So much money as will produce 5 000 rupees 4 per cent. Government securities" (7).

These bequests are not specific.

(g) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C, and directs that it shall be paid out of the property which he may leave in England.

No one of these legacies is specific.

NOTES AND COMMENTARIES.

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| § 1. <i>Legacy defined.</i> | (ii) <i>Specific legacy connected with lands.</i> |
| § 2. <i>Different kinds of legacy.</i> | (iii) <i>Specific legacy of residue.</i> |
| (a) <i>General legacy.</i> | § 3. <i>Demonstrative legacy.</i> |
| (b) <i>Specific legacy,</i> | § 4. <i>Test of specific legacy.</i> |
| (i) <i>Specific legacy of money debts, &c.</i> | § 5. <i>What passes with specific legacy.</i> |

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

- (1) See Wms. 1164, 1170.
- (2) See Wms. 1175.
- (3) See Wms. 1166.
- (4) See *Ibid.*
- (5) See *Ibid.*
- (6) See Wms. 1164, 1166.
- (7) See Wms. 1166

§ 1. Legacy defined.—"In the law of England, the term *legacy* usually denotes a gift of personal property, or something considered by the law as equivalent, or equal in nature, thereto, which devolves upon its recipient solely through the medium of a will and testament, and strictly speaking, by the assent of the executor or executors named therein" (1). See definition of "Will," *ante*.

Legacies are ordinarily given for the benefit of and payable to persons; but there are legacies which are applicable to purposes other than the benefit of persons. Such legacies are called trust legacies. Thus a legacy to be applied in erecting a monument in some particular locality, is a trust legacy. (See Ingpen, 407).

§ 2. Different kinds of legacy.—Legacies are of various denominations, but they are all comprised in two principal classes or divisions. These are (a) *general* and (b) *specific*.

(a) **General legacy.**—"A legacy is general when it is so given as not to amount to a bequest of a particular thing, or money of the testator, distinguished from all others of the same kind." Hence it is a legacy not of any particular thing, but of something which is to be provided out of the testator's general estate (2). According to Mr. Bigelow, "by the term 'general legacy' is meant, broadly speaking, a testamentary gift of personalty not defined,—a gift of chattels, indeed, but a gift which does not in terms or by implication pass identified chattels;" and by 'general devise' is meant a testamentary gift of lands not defined, that is, a gift of lands "which does not in terms or by implication pass identified lands." That is to say, a devise or legacy is general "if it is not in terms or by implication specific" (3). See illus. (f).

(b) **Specific legacy.**—A *specific* legacy may be defined to mean a bequest of a specified part, or a severed or distinguished part of the testator's property. In other words, a legacy is *specific*, when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind (4). A specific legacy is something which a testator identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates it in favour of a particular legatee from the general mass of his personal estate [see *Robertson v. Broadbent* (1883) 8 Ch. D. 812. See also *Bothamley v. Sherson*, (1875) L. R. 20 Eq. 304, where *specific legacy* has been defined by Sir G. Jessel. M. R.] (a).

(a) Lord Halsbury describes the essential elements of a specific legacy in these words: "A specific legacy must be of something forming part of the testator's estate: it must be a part as distinguished from the whole of his personal property or from the whole of general residue of his personal estate; it must be identified by a sufficient description, and separated in favour of the particular legatee from the general mass of the testator's personal estate." [See *supra*, *Bothamley v. Sherson*; *Robertson v. Broadbent*] (5). This definition is quite authoritative.

As regards general legacy he says:—"A general legacy, on the other hand, may or may not be part of the testator's property; it has no reference to the actual state of his property, and is a gift of something which, in the event of the testator leaving sufficient assets, must be raised by his executors out of his general personal estate * * * *. In the case of real estate a devise, whether of a specific property or by way of residuary, is specific." (5).

(1) Flood. 1. See Wms. 1055.

(2) Wms. 1163; 2 W. and T. L. C. 243; Theob. 124, 5th Edn.

(3) Bigelow, 206, 212.

(4) Wms. 1163; 2 W. and T. L. C. 243; Theob. 124, 5th Edn.

(5) 14 L. of Eng. 261.

This definition agrees with the definition given in this section. The most important point in a specific legacy is, that it is something specified, something distinguished from the rest of the testator's property, or something *identified*.

The distinction between a general and a specific legacy is of the utmost importance; for, as it will hereafter appear [§ 136 (S), *post*], if there be a deficiency of general assets to pay debts and legacies, a specific legacy will not be liable to abate with the general legacies, while on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to claim anything by way of compensation or satisfaction out of the general estate. Thus, "though specific legacies have in some respects the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage." [*Ashton v. Ashton*, 3 P. Wms. 315] (1).

A legacy may be specific notwithstanding the testator may expressly provide that it shall not be deemed specific [*Jacques v. Chambers*, 2 Coll. 435] (2).

The forgiveness by will of a debt due to the testator, is a specific legacy [*Re Wedmore* (1907) 2 Ch. 277. See *post*, sec. 108 (1')].

In England the Courts are generally averse to construing a legacy as specific, unless the intention of the testator is very clear. **Leaning of English Courts.** [*Kirby v. Potter*, 4 Ves. 748; *Ellis v. Walker*, Amb. 310] (3). So that, in cases of doubt, the more probable view is that the legacy is not specific. This is, perhaps, due to the fact that, although a specific legacy has certain advantages, the risk of failure from the particular subject not being found among the testator's property at the time of his death, outweighs these advantages (4). Also because, of the numerous definitions of specific legacy, none is, generally speaking, so complete as to preclude the possibility of misapprehension (5).

(2) **Specific legacy of money, debts, &c.**—A bequest of money "out of" specific money, or of stock "out of" specific stock, is specific; as, for instance, money out of the dividends of stock, or money out of money invested in stock. [*Drinkwater v. Falconer*, 2 Ves. Sen. 623; *Morley v. Bird*, 3 Ves. 628]. But a gift of money out of stock is not specific [*Kirby v. Potter*, 4 Ves. 748] (6).

So a debt due to the testator may be specifically bequeathed, as where the bequest is of "the money now owing to me from A" [*Ellis v. Walker, supra*], or "the money due to me on the bond of A." [See *Ashburner v. McGuire*, 2 Bro. C. C. 108] (7). See illus. (a).

As a general rule, legacies of money, *i.e.*, pecuniary legacies, are general legacies. But such legacies are also specific when any particular fund is indicated for their payment. Thus a bequest of a certain sum of money in a certain bag or chest [*Lawson v. Stitch*, 1 Atk. 508], or in the hands of A. [*Hinton v. Pink*, 1 P. Wms. 540] is specific (8). So where the bequest is in

(1) Wms. 1164; 2 W & T. L. C. 245.

(2) Wms. 1165.

(4) Hawk. 300.

(6) Theob. 126, 5th Edn.

(7) Wms. 1173; 2 W & T. L. C. 246; Theob. 128, 5th Edn.

(8) Wms. 1166.

(3) Wms. 1166.

(5) See Jarm. 1065—1068, 6th Ed.

these words : " I desire S. K. under this will, to pay every month Rs. 644-1-7 (being one third of Rs. 1933-5-4, my monthly pay allowed by the Government for Government promissory notes, which are deposited) to my dependants and personal servants, as detailed below," the legacy is specific [*Suleman Kadr v. Dorab Ali Khan*, I. L. R. 8 C., 1]. If, however, the money-legacy is intended to procure a specified object for the legatee, as to buy a ring or to purchase a house, then it is general [*Hinton v. Pink*, *supra*]. See illus. (f).

A bequest of a debt is equally specific, where it is made to several persons in certain shares and proportions ; nor is it the less specific in consequence of a life interest being given in it. Thus in *Ashburner v. McGuire*, *supra*, where the testator bequeathed to his sister "the interest arising from her husband's bond, due to me, for principal 3500*l.* sterling," for life, for her separate use, amounting to 175*l.* sterling per annum, and on the decease of his sister, the principal of the said bond to her four daughters, to be equally divided among them, Lord Thurlow held, that the bond was specifically given (1).

(ii) **Specific legacy connected with lands.**—Every bequest of immoveable property is specific [*Forrester v. Leigh*, Amb. 173]. But in England, although it was lately considered that since the Wills Act (Stat. 1 Vict. c. 26) a residuary devise of real estate was not specific [*Dady v. Hartridge*, 2 Dr. and Sm. 236], it is now settled that a devise of land whether by specific description or by residuary devise, is specific [*Hensman v. Fyer*, L. R. 3 Ch. 420 ; *Lancefield v. Iggulden*, L. R. 10 Ch. 136]. So a devise of land or a gift of a specific thing, to be sold and divided in definite shares among certain persons, is a specific devise or legacy [*Page v. Leapingwell*, 18 Ves. 463] ; and similarly, the gift of a rent out of a term of years, as where the testator bequeathed 40*l.* a year to A. for life, out of his estate at Kenn, is a specific bequest [*Long v. Short*, 1 P. Wms. 403] (2).

A devise of the testator's one-third share of certain property which he referred to as described "in the schedule written under the former will," is a specific devise and not residuary [*Treepoora Sundary Dasse v. Debendra Nath Tagore* (1876) I. L. R. 2 C., 45].

But a bequest of a rent-producing property upon trust, the trustees being directed to recover the rents and profits thereof and apply them for the benefit of the legatee for life, is not a specific bequest : for the legatee would not necessarily attain a specific, that is, a fixed and named annual sum, as the rents and profits are liable to fluctuate [*Bai Bhikaji v. Bai Dinbai* (1910) 13 Bom. L. R. 319].

(iii) **Specific legacy of residue.**—A bequest of all the testator's personal estate generally is not specific (3). But if a man possessing personal property at A. and elsewhere, bequeaths all his personal estate at A. to a particular person, the legacy is specific [*Sayer v. Sayer*, 2 Vern. 688]. So where the testator bequeaths the residue of all his personal property in Jamaica [*Nisbett v. Murray*, 5 Ves. 150], or makes a bequest of "all plate, linen, and furniture in my house at A, or which shall be therein at the time of my decease" [*Gayre v. Gayre*, 2 Vern. 538], the bequest is specific (4). See illus. (a) and sec. 133 (S), *post*.

(1) 2 W & T. L. C. 238, 246-47.

(2) Wms. 1175, 1176 : Theob. 126, 129, 5th Edn.

(3) Wms. 1177.

(4) Wms. 1177, 1178.

A testator may, make a specific bequest of a thing of which he contemplates the acquisition [*Fountaine v. Tyler*, 9 Pr. 94].
Bequest of a thing to be acquired. So a testator may specifically bequeath things ordered by and made for him, although not delivered or paid for till after his death [*Field v. Peckett*, 29 Beav. 575].

§ 3. Test of specific legacy.—"The true test by which to try whether a bequest is or is not specific, is to enquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts—to enquire whether or not, in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees." [*Bethune v. Kennedy* 1 *Mylne*, and Cr. 114] (1). See sec. 130 (S), *infra*, § 2.

So a gift of a part of a specific fund is specific [*Lord v. Fleming*, 2 P. W. 469]. See sec. 137 (S), *post*, illus. (a).

§ 4. What passes with specific legacy.—"The general rule is, that a gift of a specific legacy carries with it all the incidents attached to the subject-matter of the gift; or in other words, all the income and profits which may accrue upon it after the testator's death. Thus bonuses which accrue after the death of the testator upon shares specifically bequeathed by him, belong to the specific legatee. [*MacLaren v. Stainton*, 3 DeG. F. and J. 202; see *Mullins v. Smith*, 1 Dr. and Sm. 204 210] (2).

71. [130 (S).—Where a certain sum is bequeathed, the
Bequest of a certain sum, where the stocks, &c. in which it is invested are described. legacy is not specific merely because the stocks, funds, or securities in which it is invested are described in the will.

• *Illustration.*

A bequeaths to B—

"10,000 rupees of his funded property.

"10,000 rupees of his property now invested in shares of the East Indian Railway Company" (3).

"10,000 rupees, at present secured by mortgage of Rampore Factory."

No one of these legacies is specific.

Note.—They are demonstrative. See *Kirby v. Potter*, 4 Ves. 748 (4).

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Intention must be very clear to constitute specific legacy.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

(1) Wms. 1179; 1181.

(2) Wms. 1445 8th Edn.; 1162, 10th Edn.; 2 W. and T. L. C. 279.

(3) See Wms. 1170; Theob. 126, 5th Edn.

(4) See Wms. 1171; Theob. *Ibid*.

§ 1. **The section.**—This section corresponds to the following lines in Williams' "Executors":—

"—Where a certain sum is given, and the stock, &c., in which it is invested at the time of making the bequest, is described in the will, that circumstance alone will not make the legacy specific. As, where the bequest is 'to B, the sum of 12,000/ of my *funded* property, to be transferred in his name, or as it shall appear most beneficial for his interest by my executor.'" [*Lambert v. Lambert*, 11 Ves. 607] (1).

Such a gift is equivalent to a gift of money out of stock, and is therefore not specific. (*Idid*) (2).

§ 2. **Intention must be very clear to constitute specific legacy.**—In order that a bequest may be construed to be a specific legacy, the intention of the testator, with reference to the thing bequeathed, must be very clear [*Ellis v. Walker*, Ambl. 310] (3) (a).

The word "my" has been held in several cases to be evidence of the testator's intention that the legacy is specific [*Ashton v. Ashton*, 3 P. Wms. 315] But see *Parrot v. Worsford*, 1 Jac. and Walk. 594 (4). See sec. 133 (S), *post*.

72. [131 (S)].—Where a bequest is made in general terms, of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed,

Bequest of stock where the testator had at the date of his will an equal or greater amount of stock of the same kind.

Illustration.

A bequeaths to B 5,000 rupees five per cent. Government securities. A had at the date of the will 5 per cent. Government securities for 5,000 rupees

The legacy is not specific.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *The illustration.*

(a) Hence whether a legacy is specific depends wholly upon the language of the will. Although the testator may, at the time of executing the will, have an article or articles of the same kind as that which he purports to give, still, unless his language is sufficient to refer to, designate and identify the very article itself as forming a part of his estate, which he thereby gives, the legacy is not specific, but general. A specific legacy only becomes operative in case the very article given continues to form a part of the testator's estate at the time of his death. See sec. 139 (S) § 2.

(1) Wms. 1171.

(2) Theob. 127, 5th Edn.

(3) Wms. 1166.

(4) Wms. 1168; 2 W. & T. L. C. 238; Hawk. 302.

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. **The section.**—The text of this section corresponds to the following passage (1) in Mr. Justice Williams' "Executors":—

"—The mere possession by the testator, at the date of his will, of stock, &c., of equal or larger amount than the legacy, will not make the bequest specific, when it is given generally of stocks or annuities, or of stocks or annuities in particular funds, without further explanation: for the testator might mean only to direct his executor to purchase with his general estate so much stock, &c., in the fund described; and therefore that clear intention, which is requisite for making a legacy specific [sec. 130 (S)], does not here exist. If, indeed, it clearly appears from the context, that the testator meant to bequeath the identical stock, &c., he was possessed of at the date of the will, such manifest intention will render the legacy specific, although the testator has not expressly declared such intention, nor expressly referred to the stock. Thus, if a person having 1,000*l.* three per cent. consols, bequeath 1,000*l.* three per cent. consols to trustees, in trust to sell for the benefit of the legatee, the bequest will be specific; the intention being manifest, not conjectural, from the direction to sell three per cent. consols, that the testator referred to the stock he then had."

§ 2. **The illustration.**—This illustration seems to be directly opposed to the case of *Jeffreys v. Jeffreys* (3 Atk. 120) where a gift of 270*l.* 3*s.* bank stock, the testator having that particular sum and no more, was held to be specific (2).

73. [132 (S)].—A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator shall have been reduced to a certain form, or remitted to a certain place.

Bequest of money where it is not to be paid until some part of the testator's property shall have been disposed of in a certain way.

Illustration.

A bequeaths to B 10,000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realized in England.

The legacy is not specific.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *The illustration.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

(1) Wms. 1169-70.

(2) Hawk. 302; Stokes 109.

§ 1. **The section.**—Here also the text is from Williams' "Executors," as the following passage will show.

"A money legacy will not be rendered specific, by its payment being postponed until a particular investment of a fund takes place; as where the bequest is to A and B of 1,000*l.* each, 'which legacies I direct to be paid as soon as my property in India shall be realized in England'" (1).

§ 2. **The illustration.**—This is in accordance with *Sadler v Turner*, (8 Ves. 617), where it was held that a legacy with a direction that it shall be paid as soon as the testator's property in India shall be realized in England was not specific; and that in such case the legatee would be entitled to satisfaction, although the assets in India had been transmitted to England in the lifetime of the testator (see *Raymond v. Broadbelt*, 5 Ves. 199 (2).

So, where sums of money were bequeathed to persons in India and persons in England, to be respectively paid out of the effects in the respective countries, it was held that the bequests were not specific, and that the direction to pay out of the respective effects was 'only a direction as to the payment, not to make them specific' (*Kirkpatrick v. Kirkpatrick*, cited in *Roberts v. Pocock*, 4 Ves. 158) (3).

74. [133 (S)].—Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

When enumerated articles are not to be deemed to be specifically bequeathed.

NOTES AND COMMENTARIES.

§ 1. "With an enumeration of some items." § 2. Conclusion.

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. "With an enumeration of some items."—A general residuary clause is not the less general because it contains an enumeration of some of the properties of which it may consist. In *Taylor v. Taylor* [6 Sim. 246], the residuary clause in the will was, "As to all my household furniture, implements of household, implements of my trade, stock in trade, cattle, sheep, implements in husbandry, and all the rest and residue of my monies, securities for money, and personal estate whatsoever and wheresoever, not hereinbefore

(1) Wms. 1166-67.

(2) Wms. 1167; 2 W. and T. L. C. 246.

(3) Wms. 1167; 2 W. and T. L. C. 246.

by me disposed of, I give and bequeath the same and every part thereof, unto my said wife and my said sons, Thomas Taylor and Abraham Taylor, in equal shares and proportions ; and I direct that the share or shares of both or either of my said two sons, who may be under the age of 21 years, shall be employed, by my executors hereinafter named, for the benefit of such son or sons during his or their minority, in such manner as my said executors shall think proper." It was held by Sir L. Shadwell, V. C., that the articles particularly named were not specifically bequeathed, but that the testator merely meant to describe the residue of which the shares were given to his sons (a) (1).

The rule will not be excluded even if the enumeration is particularized by the word "my." Thus, in *Fielding v. Preston* [1 DeG. and J. 438], where there was a gift of "my leaseholds, my funded property, and other personal estate not hereinbefore bequeathed, Lord Cranworth held, that the gift of leaseholds and of the funded property would have both been specific, except for the circumstance that the gift "of my funded property" was followed by a gift of the rest of the estate. His Lordship said : "I think it would be very dangerous to hold that in a will where there is a gift of a residue, and the testator unnecessarily chooses to enumerate some particular things in that residuary gift, such a circumstance was sufficient to constitute the things so enumerated specific gift" (2). So, where a general gift of personalty was followed by an enumeration of particular articles, as where the gift consisted of "all my personal property, all sums of money which I may possess, or which may by owing to me at the time of my death, together with all the furniture, farming implements, and other things in the family mansion," it was held, the gift did not constitute a specific legacy [*Fairer v. Park*, L. R. 3 Ch. D. 309 ; *King v. George*, L. R. 4 Ch. D. 435] (3).

But, if the specific articles enumerated in the residuary gift, are distinguished by such words as, "as well as," "together with," or "and also," the gift of such articles will be specific [*Fitz William v. Kelly*, 10 Hare. 266, 274]. So it seems, if the enumeration of specific articles comes after the gift of the residue the same result will follow [*Bethune v. Kennedy*, 1 Mylne and Cr. 114 ; *Mills v. Brown*, 21 Beav.] (4).

§ 2. **Conclusion.**—This section and sections 130 (S) to 132 (S), *supra*, seem to point to the conclusion [as already seen in sec. 129 (S), *supra*, § 2] that the leaning of the law is always against construing a legacy to be a specific one.

(a) In regard to the inexpediency of associating particular with general words of description, it has been truly said that "of all kinds of verbosity this seems to be the most inexpedient if not pernicious ; for if these words are not absolutely nugatory [See *King v. George*, 5 Ch. D. 627] they sometimes give rise to the question whether the residuary legatee is not to stand in the favoured position of a specific legatee in regard to the enumerated articles ; and such question becomes especially important where there is a deficiency of assets to pay all the debts and legacies." (5)

- (1) Wms. 1178 ; Theob. 130, 5th Edn.
- (2) 2 W. and T. L. C. 244.
- (3) *Ibid* : Theob. 130, 205, 5th Edn.
- (4) Wms. 1179 ; Theob. 131, 5th Edn.
- (5) Hay and Jarvis, 384.

75. [134 (S)].—Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Retention in form of specific bequest to several persons in succession.

See next section and section 121 (P), *post*.

Illustrations.

(a) A, having a lease of a house for a term of years, 15 of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C. B is to enjoy the property as A left it, although, if B lives for 15 years, C can take nothing under the bequest.

(b) A, having an annuity during the life of B, bequeaths it to C for his life, and after C's death, to D. C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest.

76. [135 (S)].—Where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may, by any general rule to be made from time to time authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Sale and investment of proceeds of property bequeathed to two or more persons in succession.

See post sections 121 (P) and 125 (P) and also sections 305 and 306 of the Succession Act.

Illustration.

A, having a lease for a term of years, bequeaths "all his property" to B for life, and after B's death to C. The lease must be sold, and the proceeds invested as stated in the text, and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C.

NOTES AND COMMENTARIES.

[Sections 134 (S) and 135 (S)].

1. *The sections.*

2. "*Direction to the contrary*"[135(S)].

§ 3. *Gift of things consumable or perishable in their nature.*

§ 4. *Property.*

Extent of the section.

These sections are incorporated in the Hindu Wills Act and are applicable to the Hindus, Jains, &c.

§ 1. The sections.—The text of these sections seems to have been supplied by the following :—

“If a person bequeaths personal property *specifically* to one person for life, with remainder over afterwards, it is clear that the property must be enjoyed in *specie* by the tenant for life, notwithstanding there is a danger that one object of the testator's bounty will be defeated by the tenancy for life lasting as long as the property endures. [*Pickering v. Pickering*, 4 My. and Cr. 298, 299.] But where the bequest is not *specific*, a rule has been established, which is called “The rule in *Howe v. Lord Dartmouth*” (7 Ves., 137), the effect of which is that where a testator limits personal property to one for life with remainder over, it is *prima facie* to be presumed that the testator means that the same property which is enjoyed by the tenant for life should go to those entitled in remainder; and if any part of the property so given be of a wasting nature, as Long Annuities or leasehold estate, in order to effectuate this general purpose of the testator, such wasting property must be sold and converted into permanent property (in other words, it must be invested in such securities as are approved by a Court of Equity, for the benefit of all persons interested in it).” [See *Pickering v. Pickering*, *supra*, *Morgan v. Morgan* (14 Beav. 82); *Hives v. Hives*, (3 Hare 611)]. This rule must prevail “unless some expression of intention can be gathered from the will that the property is to be enjoyed in *specie*. For, the mere absence of any direction to convert the property is not sufficient to preclude the application of the rule” (1).

In England the effect of the later decisions, however, has been to allow small indications of intention to prevent its application. “But it must be done by a fair construction of the will, the burden being always on those who would exclude the rule” (2).

§ 2. “Direction to the contrary” [135 (S)].—For instance, “a direction to renew or keep in repair or to demise, or discharge incumbrances on leaseholds, points to enjoyment in *specie*. So, where after a bequest of a residue for life there is an express trust for conversion at a specified period; or where there is a power to sell generally, and *a fortiori* where there is a direction not to sell without consent or for a definite term of years, or a direction is given either to sell or not” (3). Again, if the property is specifically given over at the death of the tenant for life [*Collins v. Collins*, 2 M. & K. 703], or if there be a gift of a specific part of the residue at the death of the tenant for life, the latter will be entitled to specific enjoyment, that is, the rule will not apply and no conversion will take place [*Holgate v. Jennings*, 24 Beav. 623; *Macdonald v. Irvine*, L. R. 8 Ch. D. 101] (4).

§ 3. Gift of things consumable or perishable in their nature.—It may be noticed here, that, a gift for life, if specific, of things *quæ ipso usu consumuntur* (such things or articles as will be destroyed by the use to which,

(1) Wms. 916, 1125-1126, 10th Edn.; Theob. 482, 5th Edn.; 1 Jarm. 611, 4th Edn.

(2) 1 Jarm. 613, 4th Edn.

(3) 1 Jarm. 614, 615, 4th Edn.; Wms. 1183

(4) Theob. 484, 5th Edn.

from their very nature, they would necessarily be put, is an absolute gift of the property, and there cannot be a limitation over after a life interest in such articles [*Randall v. Russell*, 3 Mer. 195]. Thus a gift of "wine, spirits and hay," to a woman so long as she should remain unmarried, is a gift of the absolute interest, and this being so, any gift or limitation over must be a nullity [see *Andrew v. Andrew*, 1 Coll. 690-92]. A gift of such articles is absolute from the very nature of things. But where, a wine-merchant possessed of a large stock of wine, by his will, gave everything he died possessed of to his wife for life, and from and after her decease he bequeathed the whole of his effects that might "be then remaining" to his daughter, it was held that the widow took absolutely all the wine which the testator had for his private use, but a life interest only in that kept for the purpose of trade [*Phillips v. Beal*, 32 Beav. 25; *Cockayne v. Harrison*, L. R. 13 Eq. 432] (1).

But if consumable articles are included in a residuary bequest for life, then they must be sold, and the interest only enjoyed by the tenant for life [*Randall v. Russell*, *supra*] (2).

§ 4 Property.—Here "property" seems to be intended to include all property that admits of being sold or converted. Pecuniary legacies, therefore, do not come within the purview of this section. These are dealt with in section 121 (P) (or sec. 301, Succession Act) where the executor is authorised to invest only and not to *sell and invest*. See those sections.

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

77. [136 (S).]—If there be a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Specific legatees' rights in regard to specific legacy improperly detained.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. The section.—This section treats of the advantages a specific legatee enjoys. As to the disadvantages he labours under, see sections 137(S), 137(P) and 110(P), *post*.

§ 2. Specific legatee's rights in regard to specific legacy improperly detained.—"Where executors improperly detain a specific legacy,

(1) Wms. 1225 F. n., 1402; 2 W. & T. L. C. 249-50.

(2) Wms. 1402; 2 W. & T. L. C. 249.

the legatee will not be allowed to suffer from its depreciation. Suppose, for instance, a horse were bequeathed to A. and the executors were to keep the horse until he were worn out, and then offer him to A, he would not be obliged to take him, as he would be entitled to the value of the horse from the time when the horse was used for any purpose, just in the same way as, if the horse had been sold and the price applied in payment of debts, the legatee would have been entitled to the value with interest from the moment it was used for any other purpose [*Chaworth v. Beech*, 4 Ves. 563] (1).

(1) 2 W. and T L. C. 278.

The Hindu Wills Act.

PART XX. (ACT X, 1865).

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OF DEMONSTRATIVE LEGACIES.

78. [137 (S)].—Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Demonstrative legacy defined.

Explanation.—*The distinction between a specific legacy and a demonstrative legacy consists in this, that, where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative.*

Illustrations.

(a) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific; the legacy to C is demonstrative (1).

(b) A bequeaths to B—

“Ten bushels of the corn which shall grow in his field of Green acre.”

“80 chests of the Indigo which shall be made at his factory of Rampore.”

“10,00 rupees out of his five per cent. promissory notes of the Government of India” (2).

An annuity of 500 rupees “from his funded property” (3).

“1,000 rupees out of the sum of 2,000 rupees due to him by C.”

(c) A bequeaths to B—

An annuity, and directs it to be paid “out of the rents arising from his taluk of Ramnagore.”

“10,000 rupees out of his estate at Ramnagore”, or charges it on his estate at Ramnagore.

“10,000 rupees, being his share of the capital embarked in a certain business” (4).

Each of these bequests is demonstrative.

(1) See Wms. 1165.

(2) See Wms. 1171 Theob. 126, 5th Edn.

(3) See Wms. 1171.

(4) See Wms. 1165, 1175.

NOTES AND COMMENTARIES.

- § 1. *Demonstrative legacy described and distinguished from specific legacy.* § 2. *A typical case of demonstrative legacy.*
 § 3. *Sahib Mirza v. Umda Khanum.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the wills of Hindus, Jains, &c.

§ 1. Demonstrative legacy described and distinguished from specific legacy.—A demonstrative legacy is described in Roper in these words: “A gift of so much money, intended, for the legatee at all events, with a fund particularly referred to for its payment; so that if the estate be not the testator’s property at his death, the legacy will not fail but be payable out of his general assets,” (1). In Williams’ “Executors and Administrators” a *demonstrative* legacy is distinguished from a *specific* legacy, in the following terms:—

“A legacy of quantity is ordinarily a general legacy, but there are legacies of quantity in the nature of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the Civilians a *demonstrative legacy*: and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets [*Mann v. Copeland*, 2 Madd. 233; *Fowler v. Willoughby*, 2 Sim. and Stu. 358; *Chinnam Rajamannar v. Tadikonda Ram Chandra Rao*, I. L. R. 29 M., 155]; yet the legacy is so far specific, that it will not be liable to abate with general legacies upon a deficiency of assets” (2). In other words, a demonstrative legacy, as distinguished from general and specific legacy, “is so far of the nature of a specific legacy, that it will not abate with the general legacies until after the fund out of which it is payable is exhausted; and so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the primary means of paying it” [see *Mullins v. Smith*, 1 Drew. and Sm. 204; *Chinnam Rajamannar v. Tadikonda Ram Chandra Rao*, *supra*] (3).

It may be noted, however, that the rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended, will not apply where there are directions to the contrary [*Chinnam Rajamannar v. Tadikonda Ram Chandra Rao*, *supra*].

According to Lord Thurlow, a legacy is demonstrative, when “it is in its nature a general legacy, but there is a particular fund pointed out to satisfy it” [see *Ashburner v. McGuire*, 2 Bro. C. C. 108] (4).

The demonstrative legacies are specific in one sense; and general in another; specific, as being given out of a particular fund, and not out of the

(1) Roper, 198, 4th Edn.

(2) Wms. 913, 10th Ed; Shep. T. 433.

(3) 2 W. and T. L. C. 245; Wms. 1165

(4) 2 W. and T. L. C. 237.

estate at large; general, as consisting only of definite sums of money and not amounting to a gift of the fund itself or any aliquot part of it [*Smith v. Fitz Gerald*, 3 Ves. and B. 5] (1). So the test is to see whether the gift is one of a particular fund itself or out of that fund. If the former, the legacy is specific, and if latter, it is demonstrative (2).

Hence, whether a legacy is demonstrative or specific, depends "more upon the form of the gift than upon the intention of the testator, though the latter will also guide the Court when that form presents features of peculiarity" [see *Mullins v. Smith*, 1 Dr. and Sm. 204] (3). Thus if a testator gives a sum out of a debt to one person and the residue to another, the legacies are specific; but if he says, "I give a legacy of a particular sum to A and I desire it to be paid out of a debt due to me", the legacy is demonstrative, as the testator merely points to a fund out of which it is to be paid [*Duncan v. Duncan*, 27 Beav. 390; see also *Campbell v. Graham*, 1 Russ. and My., 453] (4).

A demonstrative legacy is further distinguished by the fact that, unlike specific legacy, where the subject-matter produces income, it does not carry that income or interest from the testator's death [*Mullins v. Smith*, 1 Dr. and Sm. 204, 210]. See *sec. 128 (P.) post*.

§ 2. **A typical case of demonstrative legacy.**—A testator bequeathed to his sister "the sum of 10,000*l.* as her sole and absolute property to be paid out of the estate and effects inherited by me from my mother in terms of her last will and testament * * * *." All the property to which the testator was entitled under the will of his mother, who had died in 1900, was comprised in his parents' marriage settlement and was reversionary, being expectant upon his father's life interest therein. Thus the testator's mother's interest was postponed to the life interest of her surviving husband and this reversionary interest was bequeathed to the testator. The testator died in 1903 and his father died in 1910. The question being whether the legacy of 10,000*l.* was demonstrative or specific, it was held that it was demonstrative; that there was nothing in the will expressly directing payment to be made only when the reversion fell in; that the mere fact that the fund out of which the legacy was directed to be primarily paid was reversionary made no difference; and that interest on the legacy ran from the expiration of a year from the testator's death [*In re Walford: Kenyon v. Walford* (1912) 1 Ch. 219, *per* Cozens-Hardy, M. R., and Farwell, L. J., reversing the decision of Joyce J.].

Under the English law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death [*Mullins v. Smith*, *supra*; *Lord Lonsborough v. Somerville* 19 Beav., 295]. The rule here is also the same [*Chinnamar Rajamannar v. Tadikonda Ram Chandra Rao*, *supra*. See *post*, sections 130 (P) and 131 (P) which entitle legatees to interest on general legacies, it being remembered that, so far as interest is concerned, as pointed out in *Mullins v. Smith* (*supra*), demonstrative legacies are to be viewed as of the nature of general legacies].

§ 3. **Sahib Mirza v. Umda Khanum.**—A testatrix declared: "Rupees 981 of the Queen's coin, out of my allowance from *wasika* and notes,

(1) Wms 1165, 1175; Hend. 283.

(2) Flood 485.

(3) *Ibid.*

(4) 2 W. and T. L. C. 247.

&c., shall be paid monthly from Government treasury to my relations, dependants, and servants, as detailed below * * * ; and the remainder of my allowance from *wasika* and notes, &c., and the whole of my landed property * * * shall be divided among my grand-sons and grand-daughters." Payment of the legacies or gifts of stipends to the servants having been refused by the representatives of the testatrix, on the ground that she had no power to dispose of the fund out of which the will must be construed to direct their payment, it was held, on a consideration of the whole will, that the words of the gifts were wide enough to charge them upon the whole of her moveable estate; and also, that if the words of the will were to be taken in more restricted sense, the gift of the stipends must be regarded as a *demonstrative legacy*, and in that view they would be payable out of the general estate, on failure of the particular fund pointed out [*Sahib Mirza v. Umda Khanum*, I. L. R. 19 C. 444; L. R. 19 I. A. 83; See *Chinnam Rajamannar v. Todikonda Rama Chandra Rao*, 29 M. 155; *Bhagwan v. Ram Das* (1908), 3 P. W. R. 609].

79. [138(S)].—Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator.

Order of payment where legacy is directed to be paid out of a fund the subject of a specific legacy.

Illustration.

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1500 rupees; of these 1500 rupees, 1000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

Extent of the Section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

In the above illustration, the legacy to B is specific, and that to C, demonstrative. By virtue of the provisions of this section the specific legacy of Rs. 1,000 is to be paid first, and the demonstrative legacy which is also of Rs. 1,000, is to be paid out of the residue; and as this residue, being only Rs. 500 is insufficient for the purpose, the balance must be paid out of the general assets.

As to what position a demonstrative legacy holds the fund being insufficient, see sec. 109 (P), *post*.

The Hindu Wills Act.

(PART XXI, ACT X, 1865).

OF ADEPTION OF LEGACIES.

80. [139(S)].—If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

Illustrations.

(a) A bequeaths to B—

“The diamond ring presented to him by C.”

“His gold chain.”

“A certain bale of wool.”

“A certain piece of cloth.”

“All his household goods which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death.”

A, in his lifetime—

Sells or gives away the ring.

Converts the chain into a cup.

Converts the wool into cloth.

Makes the cloth into a garment.

Takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(b) A bequeaths to B—

“The sum of 1,000 rupees in a certain chest.”

“All the horses in his stable.”

At the death of A no money is found in the chest, and no horses in the stable.

The legacies are adeemed.

(c) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage.

The ship and goods are lost at sea, and A is drowned.

The legacy is adeemed.

NOTES AND COMMENTARIES.

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| <p>§ 1. <i>The rule of ademption.</i></p> <p>§ 2. <i>The principle.</i></p> <p>§ 3. <i>The meaning of ademption.</i></p> <p>§ 4. <i>How ademption is effected.</i></p> <p>§ 5. <i>Application of the doctrine to will under Power.</i></p> | <p>§ 6. <i>Where specific legacy is not subject to ademption.</i></p> <p>§ 7. <i>Ademption by inconsistent gifts.</i></p> <p>§ 8. <i>Ademption and Revocation.</i></p> <p>§ 9. <i>Ademption and Satisfaction.</i></p> |
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Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. The rule of ademption. (a)—The rule of ademption applies to *specific* legacies only. It does not apply to *demonstrative legacies*, for, although the particular fund out of which such legacies are payable be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate (1). See § 140 (S), *infra*.

§ 2. The principle.—The principle is, that “in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain *in specie* as described in the will; otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed” [*Ashburner v. MacGuire*, 2 Bro. C. C. 108] (2).

Where A. bequeathed to B. the interest arising from money invested in certain Water Works company, and between the dates of the will and the death of the testator the undertaking of the company was acquired by the Metropolitan Water Board, under the Metropolis Water Act of 1902, which provided certain special stock with special advantages as compensation for the ordinary stock held in the company, it was held that the new stocks proving to be much more advantageous than the old ones, were altogether of a different character, so that the legatee cannot say that there had been only a change in form and not in substance and that he is entitled to follow the original stock. In fact, the legacy was adeemed [*In re Slater; Slater v. Slater* (1907) 1 Ch. 665 (C. A.)]

§ 3. Meaning of ademption.—Thus ademption may be defined to be the failure of a specific bequest or devise, through its subject not being in existence *in specie*, at the time of the testator's death, as part of his estate [see *Barker v. Rayner*, 3 Madd. 208] (3). “The law uses the word *ademption*, because the bequest or devise contained in the will is thereby adeemed, that is, taken out of the will” (4).

(a) *Ademption* is used in two senses: (i) to signify the loss of a devise or specific legacy by the property being destroyed, losing its identity, or being sold by the testator before his death, so that he has no such specific thing at his death to be delivered to the donee; (ii) it is used as a synonym of satisfaction, to signify that the testator has been his own executor and himself conveyed the land or paid the legacy to the donee. See def. of ademption in *Kenaday v. Sinnott* [(1900) 179 U. S. 606].

The doctrine of ademption results from the very nature of specific legacy. By its very nature as the gift of a specific, identified thing, operating as the mere gratuitous transfer of the thing without any executory obligation resting on the testator or his personal representatives, it follows that unless the very thing bequeathed is in existence at the death of the testator, and then forms a part of his estate, the legacy is wholly inoperative (5).

(1) Wms. 1326-27.

(2) 2 W. and T. L. C. 236; Wms. 1326; 2 Camp. Rul. Cas. 18.

(3) Edwards L of Pro. 405; 15 Mew's Dig. 1577.

(4) 2 W. & T. L. C. 372.

(5) 3 Pomeroy: § 1131, p. 2210.

§ 4. How ademption is effected.—In order to effect ademption it is necessary that the conversion referred to above must be complete in the lifetime of the testator. Thus a direction to sell but not carried out till after the testator's death, will not amount to an ademption [*Harrison v. Asher*, 2 DeG. and Sm. 436]. It is not, however, necessary that the conversion should be effected by the testator personally. It is sufficient if the property is converted by some duly authorized agent of the testator [*Jones v. Green*, L. R. 5 Eq. 555; *Freer v. Freer*, L. R. 22 Ch. D. 622] (1). But there will be an ademption if the specific thing is converted without authority [*Basan v. Brandon*, 8 Sim. 171; *Jenkins v. Jones*, L. R. 2 Eq. 323]; or under the authority of the law [*Fartridge v. Partridge*, Cas. temp. Talbot 226] (2). See § 150 (S) *post*.

There is no ademption where the purpose of the gift only fails. Thus where a testator gave to his brother certain collieries and for the better enabling him to carry on them, bequeathed to him 10,000*l.*, and then, shortly before his death sold all his property in the collieries to his said brother, it was held, there was no ademption of the legacy of 10,000*l.* [*Parsons v. Coke*, 27 L. J., Ch. 828] (3).

An alteration of a thing which leaves the thing substantially the same, will not effect an ademption [*Oakes v. Oakes*, 9 Hare. 666, 672] (4). See sec. 150 (S), *infra*.

So the disposition of the subject must be absolute before the legacy is adeemed. Where, therefore, a testator pawns an article specifically bequeathed, a right of redemption is left in him which passes to the legatee at his death, and there is no ademption [*Ashburner v. MacGuire*, 2 Bro. C. C. 108, 113] (5). See sec. 154 (S), illustration (a).

But ademption may be effected by the destruction of the property by *Vis Major*, or by accident, as where a ship is lost and the testator with the thing bequeathed, is drowned [*Durruant v. Friend*, 5 De G. and Sm. 343] (6). See illustration (a) *supra*.

§ 5. Application of the doctrine to will under power of appointment.—The doctrine of ademption applies to gifts under power of appointment, whether general or special, and an appointment fails in case of the non-existence at the death of the testator of either the object or subject of such appointment [*Re Dowsett* (1901) 1 Ch. 398; *Re Moses* (1902) 1 Ch. 100; S. C. (1903) A. C. 13]. It follows, that an appointment under a testamentary power may be adeemed by subsequent dealings with the settled property. Thus if a testator in the exercise of a power appoints Blackacre to A., and Blackacre is subsequently sold and the proceeds invested in the purchase of Whiteacre, the appointment is adeemed and A. takes nothing [*Gale v. Gale*, 21 Beav. 349; *Re Dowsett, supra*] (7).

§ 6. Where specific legacy is not subject to ademption.—It would appear that, because a specific legacy must be liable to ademption, there

(1) Theob. 113, 3rd Edn.; 15 Mew's Dig. 1577.

(2) Wms. 1331; 15 Mew's Dig. 1583, 1584.

(3) 15 Mew's Dig. 1580.

(4) Theob. 141, 5th Edn.

(5) Wms. 1332.

(6) Wms. 1326, F.n.; Theob. 139, 5th Edn.

(7) Jarm. 839, 6th Edn.; Farwell. 217.

could not be a specific legacy of a thing which the testator had not in his possession at the date of the will. But that does not seem to be the case; for, it is now settled that a testator may make a specific bequest of a thing which is not in his possession at the date of the will, but of which he only contemplates the acquisition [*Fountaine v. Tyler*, 9 Price 94; *Stephenson v. Dowson*, 3 Beav.

Liability to ademption is not the criterion of specific legacy. 342] (1). Thus it has been held that, the fact of its liability to ademption, is not the ordinary criterion of specific legacy, as it was once supposed to be. In England the Courts have gone further and held that a legacy may be specific, notwithstanding the testator expressly provides that it "shall not be deemed specific so as to be capable of ademption." [*Jacques v. Chambers*, 2 Coll. 435] (2).

§ 7. Ademption by inconsistent gifts.—Where a gift to one legatee in the earlier part of a will is inconsistent with a subsequent gift to another legatee in the same will, or in a codicil, this inconsistency operates as an ademption or revocation of the earlier gift [*Kermode v. MacDonald*, L. R. 1 Eq. 457] (3).

§ 8. Ademption and revocation.—Ademption is a mode of implied revocation (4). The distinction between ademption and revocation chiefly consists in the fact that, "although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy" (5). To revoke is to destroy the operative power of the instrument by some act done with the intention of destroying; whereas to adeem is not to destroy such power, but to withdraw the subject of gift from the operation of it, thereby rendering the power inoperative with respect to any particular gift. In ademption again, it is immaterial whether or not the testator intended to adeem the gift [See *Ashburner v. MacGuire* 2 Bro. C. C. 110] (6). Thus the question is, not one of construction of the will, as it is in revocation, "but of construction of an act in no respect testamentary" (7).

§ 9. Ademption and satisfaction.—See *infra*. § 2, Sec. 166 (S).

81. [140 (S)].—A demonstrative legacy is not adeemed by reason that the property on which it is charged by the Will does not exist at the time of the death of the testator, or has been converted into property of a different kind; but it shall in such case be paid out of the general assets of the testator.

Non-ademption of demonstrative legacy.

Extent of the section.

This section is applicable to the Hindus, &c.

- (1) Wms. 1172; Theob. 127, 5th Edn.
- (2) Wms. 1164, 1172.
- (3) Wms. 1326; 2 W. and T. L. C. 274; Theob. 660, 5th Edn.
- (4) Wms. 207.
- (5) Tayl. Ed. § 1048.
- (6) 2 W. and T. L. C. 246; Edward L. of Pro. 405.
- (7) Bigelow, 369.

It has already appeared that demonstrative legacies are not liable to ademption (1) [see sec. 139 (S), *supra*].—A demonstrative legacy, although when the particular fund out of which it is payable fails is liable to abatement, it is not liable to ademption and will not fail, that fund failing, but the legatee will be paid out of the general assets (see *Sahib Mirza v. Umda Khanum*, I. L. R. 19 C., 444; L. R. 19 I. A. 83).—See illus. sec. 144 (S), *post*.

82. [141 (S)].—Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Ademption of specific bequest of right to receive something from a third party,

Illustrations.

(a) A bequeaths to B—

‘The debt which C owes him.’

‘2,000 rupees which he has in the hands of D.’

‘The money due to him on the bond of E.’

‘His mortgage on the Rampur Factory.’

All these debts are extinguished in A's life time, some with and some without his consent.

All the legacies are adeemed. See Badrick v. Stevens, 3 Bro. C. C. 431 (2).

(b) A bequeaths to B.—

‘His interest in certain policies of life assurance.’

A in his lifetime receives the amount of the policies.

The legacy is adeemed (3).

NOTES AND COMMENTARIES.

Extent of the section.

This section is applicable to the Wills of Hindus, Jains, &c.

“**Testator himself receives it.**”—There is no distinction between a case “where the testator himself calls in a debt which he has bequeathed, and a case where the debtor unprovoked and without solicitation, thinks fit to pay it; that is, between a compulsory and a voluntary payment of the debt to the testator (see *Ashburner v. MacGuire*, 2 Bro. C. C. 110; *Badrick v. Stevens*, 3 Bro. C. C. 431). Thus, generally speaking, if a debt specifically bequeathed be received by the testator, the legacy is adeemed (see *Rider v. Wager*, 2 P. Wms. 329, 330) (4).

(1) Wms. 1326-27.

(2) Wms. 1327, 1329.

(3) Wms. 1327, 1329.

(4) Wms. 1327, 1329.

It is now established that in such cases, "the only rule to be adhered to is to see whether the subject of the specific bequest remained in *specie* at the time of the testator's death; for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motive and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion" [Lord Thurlow in *Humphries v. Humphries*, 2 Cox. 185] (1).

83. [142 (S)].—The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

Ademption pro tanto
by testator's receipt
of part of entire
thing specifically be-
queathed,

Illustration.

A bequeaths to B "the debt due to him by C." The debt amounts to 10,000 rupees. C pays to A 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

NOTES AND COMMENTARIES.

Extent of the section.

This section is applicable to the Wills of Hindus, Jains, &c.

The last preceding section provides that if a debt (*i. e.*, a right to receive something of value from a third party) specifically bequeathed be received by the testator, the legacy is adeemed. This is so, because the subject of the specific bequest is wholly extinguished and nothing remains to which the words of the will can apply. This section, which follows almost as a corollary from the above, lays down in substance, that even a part of a thing, whether of a debt or any other property, specifically bequeathed, may be adeemed. So a partial receipt by the testator of any debt whether paid voluntarily or otherwise, will operate as an ademption *pro tanto*. The only material difference between these two sections is, that one treats of the right to receive something from a third party, and the other of the thing itself, and not the mere right to receive it (see *Ashburner v. MacGuire*, 2 Bro. C. C. 110; *Fryer v. Morris*, 9 Ves. 360; *Aston v. Wood*, 43 L. J. Ch. 715) (2).

The illustration is in accordance with *Fryer v. Morris* (*supra*), where the specific legacy was of money due on a note for 400*l.*, and the testatrix received 385*l.* 18*s.* of the debt, and it was held that such receipt operated as an ademption on the ground that the thing given and described no longer existed (3).

(1) Wms. 1329.

(2) Wms. 1327, 1328; Theob.; 141, 5th Edn.

(3) Wms. 1328.

84. [143 (S)].---If a portion of an entire fund or stock be specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Ademption pro tanto
by testator's receipt
of portion of an entire
fund of which a portion
has been specifically bequeathed.

Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees, due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

NOTES AND COMMENTARIES.

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, Sikhs, &c.

Where a testator devised all the shares he held in a certain company to trustees upon trust to transfer the same to his infant son on his attaining majority (21 years), and the executors transferred some of the shares to a creditor in payment of his debt; it was held, that the legatee was entitled to compensation out of the residuary estate for the shares so transferred, but the value of those shares was to be determined as on the date when he could have claimed the transfer of the shares, *viz.*, when he attained the age of 21. It makes no difference in principle wheather the gift is to the son directly or through the intervention of trustees [*Re Broadwood : Lyall v. Broadwood*, (1911) 1 Ch. 277].

85. [144 (S)]. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee; if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied

Order of payment
where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund to another, and the testator having received a portion of that fund, the remainder is insufficient to pay both legacies.

so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. A afterwards receives 500 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

NOTES AND COMMENTARIES.

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

Illustration.—Here 1,000 rupees are specifically bequeathed to B, and a legacy of 1,000 rupees is charged on the debt due from W, which is therefore a demonstrative legacy. After the receipt of 500 rupees by the testator from the debtor, out of the balance, Rs. 1,500, the specific legacy to B is to be paid first; and then the demonstrative legacy is to be paid out of what remains of the particular fund charged upon, *i.e.* 500 rupees. But that being insufficient, the remainder will be paid out of the general assets.

If instead of 500 rupees the testator receive 1,000 rupees, leaving nothing for the satisfaction of the demonstrative legacy out of the particular fund, it will partake of the nature of a general legacy and will have to be paid entirely out of the general assets, subject to the abatement as the circumstances of the case may require. This explains why demonstrative legacy is not liable to ademption.

This section may be compared with section 138(S), *ante*.

Ademption where stock, specifically bequeathed, does not exist at testator's death.

86. [145 (S)].—Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

Illustration.

A bequeaths to B—

"His Capital stock of 1,000*l.* in East India Stock."

"His promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan."

A sells the stock and the notes.

The legacies are adeemed.

NOTES AND COMMENTARIES.

§ 1. *The section.*§ 2. *Illustrative case.**Extent of the section.*

This section is applicable to the Wills of Hindus, Jaina's, &c.

§ 1. *The section.*—This section prescribes the general rule which governs cases of ademption. See *ante*, sec. 139(S). See also sections 150(S), 152(S), *post*.

§ 2. *Illustrative case.*—Thus where A. bequeathed to B. the interest arising from money invested in certain Water Works Company, and between the dates of the will and the death of the testator the undertaking of the company was acquired by the Metropolitan Water Board, under the Metropolis Water Act of 1902, which provided certain special stock with special advantages as compensation for the ordinary stock held in the company; it was held, that the legacy was adeemed, the original stock having ceased to exist at the testator's death [*In re Slater*: *Slater v. Slater* (1907) 1 Ch. 665 (C. A.)].

87. [146 (S)].—Where stock which has been specifically bequeathed, does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Ademption pro tanto
where stock, specifically bequeathed, exists in part only at testator's death.

Extent of the section.

This section is applicable to the Wills of Hindu, &c.

Illustration.

A bequeaths to B—

"His 10,000 rupees in the 5½ per cent. loan of the Government of India."

A sells one-half of his 10,000 rupees in the loan in question.

One-half of the legacy is adeemed.

The meaning of the section is,—when a thing is specifically bequeathed, and it does not wholly, or does only in part exist at the time of the testator's death, the legacy is either totally or partially adeemed, as the case may be [*Ashburner v. MacGuire*, 2 Bro. C. C. 110; *Humphreys v. Humphreys* 2 Cox. 185(1)].

(1) Wms. 1330; Theob. 115, 3rd. Edn.; Hend. 284.

88. [147 (S)].—A specific bequest of goods under a description connecting them with a certain place, is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Non-adeption of specific bequest of goods described as connected with a certain place by reason of removal.

Illustrations.

A bequeaths to B "all his household goods which shall be in or about his dwelling house in Calcutta at the time of his death." The goods are removed from the house to save them from fire. A dies before they are brought back.

A bequeaths to B "all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death." During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legacies is adeemed. See next section.

89. [148 (S)].—The removal of the thing bequeathed from the place in which it is stated in the will to be situated, does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

When removal of thing bequeathed does not constitute ademption.

Illustrations.

A bequeaths to B all the bills, bonds, and other securities for money belonging to him then lying in his lodgings in Calcutta. At the time of his death, these effects had been removed from his lodgings in Calcutta.

A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only, which he removes with himself to each house. At the time of his death, the furniture is in the house at Chinsurah.

A bequeaths to B all his goods on board a certain ship then lying in the river Hughli. The goods are removed by A's directions to a warehouse in which they remain at the time of A's death.

No one of these legacies is revoked by ademption.

NOTES AND COMMENTARIES.

[Sections 147 (S) & 148 (S)]

§ 1. *Ademption by removal.*

§ 2. *Where removal is immaterial.*

§ 3. *Ademption by removal, a question of construction.*

Extent of the sections.*

These sections are applicable to the Wills of Hindus, Jains, &c.

§ 1. Ademption by removal.—Ademption is sometimes effected by the mere removal of goods. Thus where the bequest was of all the testator's household goods, plate, linen, &c., which should be in or about his dwelling house at B at the time of his death, and he afterwards took another house, into which he removed the greater part of the furniture from the house at B; this removal was held an ademption [*Heseltine v. Heseltine*, 3 Madd. 276; see *Spencer v. Spencer*, 21 Beav. 548] (1). The removal may be by agent with the approbation of the testator [*Shaftsbury v. Shaftsbury*, 2 Vern. 747] (2). But no such ademption will take place where the goods are removed for their preservation, as to save them from fire [*Chapman v. Hart*, 1 Ves. Sen. 273] (3); or where they are removed by fraud, or without the testator's knowledge or authority [*Shaftsbury v. Shaftsbury*, 2 Vern. 747] (4); or where by the nature of the place described, it is clear that their locality was not referred to, as essential to the bequest, as in the case of a specific legacy of goods in a ship [*Chapman v. Hart, supra*]; or where the testator has two houses, in which he lives alternately, and being possessed of one set of furniture only, which he removes with himself to each house, bequeaths, while residing in one of them, all his furniture in that house [*Land v. Devaynes*, 4 Bro. C. C. 537] (5).

§ 2. Where removal is immaterial.—But where the bequest is of goods under a description not connecting them with any particular place, the removal of the articles bequeathed to a different place is immaterial. Thus in *Norris v. Norris*, (2 Coll. 719), where a testator bequeathed to his wife "All my interest in my house at Lavender Hill, the furniture, books, pictures, wines," &c., and after the date of the will, be removed from Lavender Hill to Spencer Lodge, taking with him the said furniture, &c., and then purchased more of these articles, and died at the latter place, it was held that his wife was entitled to the furniture, books, &c., which he had at the time of his death. Sir J. L. Knight Bruce, V.-C., said: "The language must, I conceive, be taken to have been used generally, not with regard to any particular place, nor with regard only to such furniture, books, pictures, wines, &c., as he had when he made his will" (6).

§ 3. Ademption by removal, a question of construction.—Thus it is a question of construction whether the locality referred to is a substantive part of the bequest or is merely descriptive of the things bequeathed. The nature of the place is sometimes a criterion. In illustration (c) sec. 148 (S), for instance, the reference to the locality is purely descriptive; because the goods could not be intended to remain indefinitely on board the ship, and therefore their removal to a warehouse where they are to remain till his death, would not operate as ademption [see *Cunningham v. Ross*, 2 Cas. temp. Lce. 272; *Norris v. Norris, supra*] (7).

(1) Wms. 1333; Theob. 143, 5th Edn.

(2) 2 W. and T. L. C. 265.

(3) Wms. 1333; Theob. 143, 5th Edn.

(4) *Ibid.*

(5) Wms. 1333; see Theob. 116, 3rd Edn.

(6) 2 W. and T. L. C. 266, 267; Theob. 115, 3rd Edn.; Wms. 1334.

(7) Hend. 287, Wms. 1333, 1334; Theob.; 143, 5th Edn.

90. [149(S)].—Where the thing bequeathed is not the

When the thing bequeathed is a valuable to be received by the testator from a third person; and the testator himself or his representative receives it.

right to receive something of value from a third person, but the money or other commodity which shall be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C, and sets it apart from the general mass of his property.

The legacy is not adeemed.

See sec. 141 (S) *ante*.

NOTES AND COMMENTARIES.*Extent of the section.*

This section is incorporated in the Hindu Wills Act.

There is a distinction between the gift of a debt *qua* debt and the gift of the sum of money produced when the debt shall have been recovered and ceased to exist as a debt; as for example, where there is a gift of "whatever sum may be received from my claim on A. B." In such a case it may be inferred that the testator contemplated the recovery of the debt in his own lifetime, and that the subject of the gift is not the debt itself, but the amount recovered in respect of it; and the receipt of such amount by the testator will be no ademption: at all events, if he sets it apart and does not mix it with the general mass of his property" [*Clark v. Browne*, 2 Sm. and G. 524] (1).

These are more properly cases of construction. [See *Harrison v. Jackson*, 7 C. D. 339 (2), where *Clark v. Browne* (*supra*) was disapproved].

91. [150 (S)].—Where a thing specifically bequeathed undergoes a change between the date of the Will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any

Change by operation of law of subject of specific bequest between date of Will and testator's death.

legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Illustrations.

A bequeaths to B "all the money which he has in the 5½ per cent loan of the Government of India." The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock.

A bequeaths to B the sum of 2000*l.*, invested in consols in the names of trustees for A. The sum of 2000*l.* is transferred by the trustees into A's own name.

A bequeaths to B the sum of 10,000 rupees in promissory notes of the Government of India which he has power, under his marriage settlement, to dispose of by Will. Afterwards, in A's lifetime, the fund is converted into consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

Note.—In these cases the conversion or transfer of the stock does not afford evidence of such alteration of the testator's intention as generally constitute the reason for ademption [see *Partridge v. Partridge* Cas. temp. Talbot, - 227] (1). All cases of ademption arise from a supposed alteration of the testator's intention.

NOTES AND COMMENTARIES.

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees.

No ademption will take place when the stock specifically bequeathed is exchanged by act of law; as when a fund is converted into one of a different description by Act of Parliament. For such a change leaves the thing to all intents and purposes, the same as it was before [*Partridge v. Partridge*, *supra*; *Oakes v. Oakes*, 9 Ha. 666] (2). Similarly, where the stock has been transferred to another fund by a trustee without the knowledge or authority of the testator, there will be no ademption [*Shaftsbury v. Shaftsbury*, 2 Vern. 747] (3); nor where the stock is merely transferred with the testator's consent, from the name of his trustee to his own [*Dingwell v. Askew*, 1 Cox. 427] (4), or from the names of old to those of new trustees, or from the specified fund to a fresh security, under a power so to do; nor will the legacy be adeemed when the testator lends the stock specifically bequeathed on condition of its being replaced (5).

But where a testator bequeathed his ten 4*l.* fully paid ordinary shares in a company to N., and between the date of the will and of the death of the testator there was a dissolution of the company and a new company formed under the same name, and in accordance with the scheme of such new company the

(1) Stokes. 119.

(2) Wms. 1331; Theob. 114, 3rd Edn.

(3) Wms. 1331.

(4) Wm. 1331; Theob. 114, 3rd Edn.

(5) 1 Rep. Leg. 292, 3rd Edn. (Wms. 1331).

testator became entitled to two 5 $\frac{1}{2}$ % fully-paid preference shares and two 5 $\frac{1}{2}$ % fully paid ordinary shares for every 4 $\frac{1}{2}$ % ordinary shares he held in the old company, it was held, there had been no ademption, and N. was entitled to the substituted shares in the new company. Here the new company is substantially the old company, and the testator's interest in the latter "remains and is represented by the shares in the new company, and is practically the same, and is changed in name and form only" [*In re Leeming*; *Turner v. Leeming* (1912) 1 Ch. 828].

Where at the date of his will the testator possessed Lambeth Water-Works Stock which subsequently to his will, was exchanged under the provisions of an Act passed before the date of his will for Metropolitan Water-Board Stock, it was held, that a specific legacy of the Lambeth Water-Works Stock was adeemed [*Re Slater*; *Slater v. Slater* (1907) 1 Ch. 665]. See *supra*, sec. 145 (S).

92. [151 (S)].—Where a thing specifically bequeathed undergoes a change between the date of the Will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Change of subject
without testator's
knowledge.

Illustration.

A bequeaths to B "all his 3 per cent. consols." The consols are, without A's knowledge sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

See sec. 139, *ante*, § 3.

NOTES AND COMMENTARIES.

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to Hindus, &c.

If stock standing in the name of a trustee and specifically bequeathed were sold or transferred to another fund without the testator's knowledge or authority, the legacy is not adeemed, for the act of the trustee will not be allowed to prejudice the *cestui que trust* or the persons claiming under him. The legatee would be entitled to follow the subject into other funds or to full recompense out of the trustee's own property, as the nature of the case may require (1). So, where the subject of a specific legacy is sold during the testator's lunacy, by his son (*In re Jones*, 12 Jur. N. S. 368) (2), or is wrongfully converted or removed without the knowledge or sanction of the testator by a third person [*Damville v. Taylor*, 32 Beav. 604; *Shaftsbury v. Shaftsbury*, 2 Vern. 747; see also *Bason v. Brandon*, 8 Sim. 171] (3). In *Bason v. Brandon* (*supra*), Sir L. Shadwell, V.-C., expressed his opinion to the effect that "a mere unexecuted intention to change the state of a fund, which the testator might have revoked, and which, in fact, was never carried into execution, cannot in any sense, be considered as an ademption" (4).

(1) 1 Rep. Leg. 290, 3rd Edn.; Stokes. 119.

(2) Wms. 1331, and F. n.; Theob. 113, 3rd Edn.

(3) *Ibid.*

(4) Wms. 1332.

93. [152 (S)].—Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is re-placed accordingly, the legacy is not adeemed.

Stock specifically bequeathed, lent to a third party on condition that it shall be replaced.

"Here the testator continues owner of the stock, notwithstanding the loan of it; and although it be not literally existing in his possession at his decease, yet he is substantially and beneficially possessed of it at that period" (1)

See the concluding lines of the notes to section 150 (S), *ante*.

94. [153 (S)].—Where stock specifically bequeathed is sold and, an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

Stock specifically bequeathed, sold but replaced and belonging to the testator at his death.

NOTES AND COMMENTARIES.

Extent of the section.

This section is extended to the Hindus, Jainas, &c.

§ 1. The section.—It seems this section is in accordance with the dictum of Lord Talbot in *Partridge v. Partridge* (Cas temp. Talbot, 226) to the effect that, "All cases of ademption of legacies arise from a supposed alteration of the intention of the testator; and if the selling out of the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again" (2).

§ 2. Revival of adeemed legacy.—A mere republication of the will or its confirmation by a codicil, does not revive a legacy which has been adeemed [*Drinkwater v. Falconer*, 2 Ves. Sen. 626]. "So, though a codicil, republishing a will, makes the will speak as from the date of the codicil for the purpose of passing after-purchased lands, yet it does not for the purpose of reviving a legacy revoked, adeemed or satisfied [*Booker v. Allen*, 2 Russ. and M. 270: *Montague v. Montague*, 15 Beav. 565; *Hopwood v. Hopwood*, 7 H. of L. 728]. But if, between the ademption and the republication, the testator has acquired property, which will answer the description of the adeemed legacy, the legatee will, it should seem, be entitled to the new subject; because, by the republishing the will is made to speak from the date of the republication" [*Alford v. Earle*, 2 Vern. 209. But see *Abney v. Miller*, 2 Atk. 599] (3).

(1) 1 Rep. Leg. 292 (Wms. 1331; Stokes. 119).

(2) 2 W. and T. L. C. 270.

(3) Wms. 1337, 1338.

The Hindu Wills Act.

PART XXII, (ACT X, 1865).

-:0:-

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST.

95. [154 (S)].—Where property specifically bequeathed is subject at the death of the testator to any pledge, lien, or incumbrance, created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance. A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Non-liability of executor to exonerate specific legatees.

Explanation.—*A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.*

Illustrations.

(a) A bequeaths to B the diamond ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the estate of the testator's assets will allow them, to allow B to redeem the ring.

(b) A bequeaths to B a zemindary, which at A's death is subject to a mortgage for 10,000 rupees; and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Genesis of the section.*

§ 3. *"Unless a contrary intention, &c."*

§ 4. *Devise by mortgagee.*

Extent of the section. *

This section is embodied in the Hindu Wills Act and applies to the Hindus, Jains, &c.

§ 1. **The section.**—This section is modelled on the principle laid down in the Real Estate Charges Act, 1854 [Stat. 17 and 18 Vict. c. 113], commonly known as Locke King's Act.

§ 2. **Genesis of the section.**—In England, it being an established rule that the general personal estate of a deceased person is the primary and natural fund which must be resorted to in the first instance for the payment of all his debts, formerly, even debts secured by mortgage, were primarily payable out of the same, in the same manner as debts not so secured; so that, the person to whom the equity of redemption of a deceased mortgagor passed, was entitled to have the mortgage debt satisfied out of the deceased's general personal estate, and thus to free the mortgaged property from that debt, unless the deceased, by will or deed expressed a contrary intention [see *Duke of Ancaster v. Meyer*, 1 Bro. C. C. 454] (1). But this rule was altered by the said Statute of 1854 (Locke King's Act), which provided, in effect, that the heir or devisee upon whom a mortgaged estate devolved or descended, should not be entitled to have the mortgage debt discharged or satisfied out of the deceased's personal estate, or any other of his real estate, but that the lands or hereditaments so mortgaged or charged, should be primarily liable for the payment of such debt, unless the deceased shall "by his will or deed or other document, have signified any contrary or other intention" (2).

As, however, this Statute extends only to "any estate or interest in lands or other hereditaments," that is, to real property, the old rule, that the personal estate is to be deemed the natural and primary fund for the payment of all debts, still prevails as regards properties which are personal (3). The result is, that in England, if a specific legacy is pledged or otherwise encumbered by the testator, the legatee is entitled to have his specific legacy redeemed or exonerated by the executor, out of the general personal estate, and if the executor fail to perform that duty, the specific legatee is entitled to compensation, to the amount of the legacy at the expense of the same estate [*Knight v. Davis* 3 My. and K. 358]. If, for instance, there be a legacy of a silver cup and it be in pledge at the testator's death, the legatee will be entitled to call upon the executor to redeem it, and to deliver it to him (4). Thus in England, the bequest of a specific article which is pledged or pawned by the testator, is considered to be a full gift, as the executor is bound to redeem it, if the assets are sufficient [see *Ashburner v. M'C. Guire*, 2 Bro. C. C. 111] (5).

But in India, there being no distinction between realty and personalty so far as their devolution is concerned, the principle of Locke King's Act has been deemed best fitted for it. Accordingly, this section, following that principle, lays down a different rule so far as English personalties and such cases as do

(1) Wms. 1699; Coote's Mortgage, 937; 2 Jarm. 634, 4th Edn.; Walker. & Elg. 182; Edw. L. of Pro. 226; Hawk. 278; 2 W. & T. L. C. 681; Theob. 150 5th Edn.

(2) Wms. 1708; 2 Jarm. 646, 4th Edn.; Theob. 150, 5th Edn.; Coote's Mortgage, 937.

(3) 2 Jarm. 651, 4th Edn.

(4) Wms. 1770; 2 Jarm. 632, 4th Edn.; Theob. 147-48, 5th Edn.; Story Eq. Jur. § 566a; Hend. 289.

(5) 2 W. & T. L. C. 236.

not come within the operation of that Act, are concerned. Hence, whether personalty or realty, if the subject of gift specifically given, is burdened with a pledge or incumbrance, created by the testator, the legatee or devisee will be liable to make good the amount of such pledge or incumbrance, unless a contrary intention shall appear from the will.

§ 3. “Unless a contrary intention, &c.”—Sir Whitley Stokes says:—“The great difficulty on this section, as it has been on Locke King’s Act, will be to determine what amounts to ‘a contrary intention’ within the meaning of the Act, so as to relieve the legatee from liability to make good the amount of the incumbrance” (1).

The section itself lays down that a mere direction “for the payment of the testator’s debts generally,” is not sufficient for the inference of a *contrary intention*. This is in accordance with *Pembroke v. Friend* (1 John & H. 132), in which the testator directed that “all his just debts shall be paid” [see *Brownson v. Lawrence*, L. R. 6 Eq. 1]. So where the testator directed that all his debts should be paid by his executors “out of his estate” [*Woolstencroft v. Woolstencroft*, 2 DeG. F. & J. 347], or where the direction was to pay all the debts “out of the personal estate” [*Rowson v. Harrison*, 31 Beav. 207], it was held that this was not a sufficient indication of a contrary intention (2).

It appears to be settled that in order to exonerate the mortgaged property, it is not necessary “that the mortgage debt should be thrown by name upon any other fund;” but that if there is a specific devise of the mortgaged estate without any mention of the mortgage, and there is also a bequest of the personal estate “subject to the payment of all the testor’s debts,” or the debts are directed to be paid out of it, this is a sufficient indication of a contrary intention [*Stone v. Parker*, 1 Dr. and Sm. 212; *Smith v. Smith*, 3 Giff. 263; *Mellish v. Vallins*, 2 John and H. 194]. Thus if the mortgaged land be devised specifically, and the testator’s debts are directed to be paid out of his *residuary* real and personal estate, or the *residuary* real and personal estate be devised subject to the payment of such debts, this will amount to a contrary intention and the mortgaged estate will be exonerated [*Stone v. Parker*, *supra*; *Allen v. Allen*, 30 Beav. 395] (3). The result seems to be, that, wherever there is a direction that the debts should be paid out of some particular fund other than the mortgaged estate, the pledged or mortgaged property is exempted from liability [*Eno v. Tatham*, 4 Giff. 181] (4). But even in such cases, it seems, the devisee will be exonerated only so far as that fund goes [*Rodhouse v. Mold*, 35 L. J. Ch. 67] (5).

Where part of lands subject to a mortgage being specifically devised, the rest is given to the residuary devisee, or where a life interest in such lands being given, the remainder is given to the residuary devisee, this will afford no indication of an intention that the mortgage debt is to be borne by the residuary devisee [*Gibbins v. Eyden* L. R. 7 Eq. 371; *Sackville v. Smith*, L. R. 17 Eq. 153; *In re Smith*; *Hannington v. True*, L. R. 33 Ch. D. 195, overruling *Brownson v. Lawrence*, L. R. 6 Eq. 1] (6).

(1) Stokes 121.

(2) Wms. 1709; 2 Jarm. 611, 3rd Edn.; 647, 4th Edn.; Hawk. 281, 282; Theob. 154, 5th Edn.

(3) Wms. 1709, F. n.; Hawk. 280-81; Theob. 154, 5th Edn.

(4) Wms. 1709, F. n.; Hawk. 281.

(5) Wms. 1709; Theob. 156, 5th Edn.

(6) Wms. 1709; Theob. 150, 5th Edn.

Where different portions of an estate subject to a mortgage are devised to different persons, the devisees must contribute rateably to pay the mortgage debt according to the value of the portions devised to them [*In re Newmarch*; *Newmarch v. Storr*, L. R. 9 Ch. D. 12] (1).

As to the rule with respect to exempting the personal estate, it seems to be settled that such estate will be exempted, "if the intention of the testator in its favour can be collected from a sound interpretation put upon the whole will; in other words, if there appears from the whole testamentary disposition taken together, an intention on the part of the testator so expressed, as to convince a *judicial* mind, that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal" (Lord Eldon in *Boottle v. Blundell*, 1 Meriv. 230) (2). That is to say, the contrary intention is to be ascertained by referring to the will and also to the mortgage and other deeds connected with it [*In re Campbell*; *Campbell v. Campbell*, (1893) 2 Ch. 206].

The words "contrary or other intention," in Locke King's Act, have been defined by section 1, Stat. 30 and 31 Vict. c. 69, which enacts (as to wills made after 31st December 1867) that "a general direction that the debts or all the debts of a testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to, or other than the rule established by, the said Act (*i.e.*, Locke King's Act), unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate" (3). This enactment has been explained by Giffard, V. C., in *Nelson v. Page*, (L. R. 7 Eq. 25, at 28), in the following words:—"If a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to them" (4).

The expression "all my just debts" includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the will, and contracted in a country other than that of his domicile, and secured upon property in that country [*Maxwell v. Maxwell*, L. R. 4 H. L. 506] (5).

§ 4. Devise by mortgagee.—Where a mortgagee in possession of freehold estates, specifically devises such property, the specific devisee becomes entitled to the mortgage debt, which accordingly, passes to such devisee and not to the residuary legatee [*In re Carter*; *Dodds v. Pearson*, (1900) 1 Ch. 801]. In *In re Lowman*; *Devenish v. Pester*, [(1895) 2 Ch. 341], Lindley, L. J., says:—"What, after all, is a devise of land? It is only a devise of such estate or interest as the devisor has in the land, and *prima facie* whatever estate or interest the testator has in land, will pass under a devise of it by that name, if it is specifically referred to, so as to shew that the testator had that particular land in his mind, and if there is nothing else to answer the description." If, therefore,

What is devise of land.

(1) Theob. 156-57, 5th Edn.

(2) Wms. 1712.

(3) Hend. T. S. 145, 2nd Edn.; Theob. 151, 5th Edn.

(4) Hend. T. S. 145, 2nd Edn.; Theob. 124, 3rd Edn.

(5) Wms. 1719; Theob. 718, 5th Edn.

the testator devises an estate by name when in fact he has an interest only in the proceeds of sale of the estate, that interest passes [*Cooper v. Martin*, 3 Ch. 47; *In re Lawman, supra*] (1).

96. [155 (S)].—Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Completion of testator's title to things bequeathed to be at cost of his estate.

Illustrations.

(a) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to B, and dies before he has paid the purchase-money. The purchase-money must be made good out of A's assets.

(b) A, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down, and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

NOTES AND COMMENTARIES.

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the wills of Hindus, Jains, &c.

There is a distinction between charges created by the testator himself (as in section 154) and liabilities incident to the thing bequeathed. This section and sec. 157 (S) (*infra*) deal with the latter (2).

If the purchaser of a real estate dies, without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator. And if before the assets are got in, the devisee or heir pay for the thing bequeathed out of his own pocket he may afterwards call on the testator's representative to reimburse him. So, if the assets are insufficient to pay the purchase-money and the agreement is on that account rescinded, the heir or devisee will be entitled to the assets so far as they go. And if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for, may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit. But if a title cannot be made or there was not a perfect contract or the Court should think the contract ought not to be executed, the devisee will not be entitled to any thing [see *Broome v. Monk*, 10 Ves. 597; *Whittaker v. Whittaker*, 4 Bro. C. C. 30] (3).

(1) See Theob. 122, 201, 5th Edn.

(2) See Hend. T. S. 146, 2nd Edn.

(3) Wms. 1769, Sugd. V. and P. 212, 11th Ed.; Theob. 237, 5th Edn.

So, in the case of stock or shares, where the testator has contracted to pay certain sums in respect of shares which he has agreed to take in a particular company, payments due at his death must be paid by his general estate [see *Day v. Day*, 1 Dr. and Sm. 261] (1). See sec. 157 (S) *post*.

97. [156 (S)]—Where there is a bequest of any interest in immovable property, in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them up to the day of his death.

Exoneration of legatee's immovable property for which land-revenue or rent is payable periodically.

Illustration.

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time and dies 25 days after. A's estate shall make good 25 rupees in respect of the rent.

98. [157 (S)]—In the absence of any direction in the Will, where there is a specific bequest of stock in a Joint Stock Company, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate. But, if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by the legatee if he accept the bequest.

Exoneration of specific legatee's stock in a Joint Stock Company.

Illustrations.

(a) A bequeathed to B his shares in a certain railway. At A's death there was due from him the sum of 5*l.* in respect of each share, being the amount of a call which had been duly made, and the sum of 5*s.* in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

(b) A has agreed to take 50 shares in an intended Joint Stock Company and has contracted to pay up 5*l.* in respect of each share which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.

(c) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.

(d) A bequeaths to B his shares in a Joint Stock Company. B accepts the bequest. Afterwards the affairs of the Company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(e) A is the owner of ten shares in a Railway Company. At a meeting held during his lifetime, a call is made of 3*l.* per share, payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *As to calls upon shares.*

§ 3. *"If he accepts the bequest."*

§ 4. *Stock and shares.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c

§ 1. **The section**—This section seems to embody the rule laid down in *Day v. Day* (1 Dr. & Sm. 261), *Armstrong v. Burnet* (20 Beav. 424), and *Addams v. Ferick* (26 Beav. 384) (1).

Illus. (b) is *Armstrong v. Burnet*, and illustration (e) was suggested by *Addams v. Ferick* (2).

§ 2. **As to calls upon shares** (3)—“With respect to specific legacies of shares in banking or other public companies, the legatees are, generally speaking, liable to pay the calls, made subsequent to the testator's death. The cases on this subject were fully reviewed by Romilly, M. R., in the case of *Armstrong v. Burnet* (*supra*), and a distinction drawn by the learned Judge, that where the interest of the testator in the subject matter which he professes to bequeath is complete, or where it is so treated and considered by him and by all persons connected with it, the future calls fall on the legatee, and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose” [see *Day v. Day*, *supra*; *Moffett v. Bates*, 3 Sm. and G. 468; *Addams v. Ferick*, *supra*] (4).

“The right principle appears to be that if any payments were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate. But if he was a complete shareholder, all calls made after his death ought to be borne by the specific legatee. But this does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares) as an entire fund” (5).

(1) Stokes 122.

(2) *Ibid*; see Theob. 149, 5th Edn.

(3) See Act VII of 1913 (Indian Companies Act) 1st Schedule, paras. 12 to 17 both inclusive.

(4) Wms. 1771-72; 2 Jarm. 597, 3rd Edn.; 149, 5th Edn.

(5) Wms. 1772 F.n.

As to calls, the English cases are somewhat conflicting. The rule laid down in *Day v. Day* (1 Dr. and Sm. 261), to the effect that, where shares in Joint Stock Companies are specifically bequeathed, the legatee is liable to pay all calls made after the testator's death, but is entitled to have all unpaid calls, which, at the testator's death, were necessary to make him a complete shareholder borne by the estate, seems to be now generally followed in England (1).

§ 3. "If he accept the bequest"—Where the person named as legatee repudiates the legacy he cannot, of course, be subjected to any of the liabilities attaching to the testator's interest [*Moffett v. Bates*, 3 Sm. and G. 468] (2).

§ 4. **Stock and shares**—"Stock" and "shares" are now considered as convertible terms when occurring in a bequest, and therefore a gift of "shares" will carry "stock," and *vice versa*.—"Of course, it does not follow that a man possessing shares necessarily has stock, but if he own shares in their aggregate form, in other words, stock, he must necessarily own them in their individual character, and it may be further stated that every stockholder in a company is a share holder, though every shareholder is not, in consequence, a stockholder" (3).

There is no difference between railway "stock" and railway "shares" as pointed out by Lord Chancellor Cairns in *Morrice v. Aylmer* (L. R. 10 Ch. 148) (4).

(1) Theob. 149, 5th Edn.; Stokes 122; Hend. 293.

(2) Stokes 122; 2 Jarm 597, 3rd Edn.

(3) Flood, 170.

(4) Flood, 169; 1 Jarm. 393 F n. (i), 4th Edn.; Wms. 1198.

The Hindu Wills Act.

PART XXIII, (ACT X, 1865).

-:0:-

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

99. [158 (S)]. —If there be a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Bequest of things described in general terms.

Illustrations.

(a) A bequeaths to B a pair of carriage horses, or a diamond ring. The executor must provide the legatee with such articles, if the state of the assets will allow it.

(b) A bequeaths to B "his pair of carriage horses." A had no carriage horses at the time of his death. The legacy fails.

NOTES AND COMMENTARIES.

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees.

§ 1. **An example.**—So, if the bequest is of "a horse," and no horse be found in the testator's possession at the time of his death, the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee (1). See sec. 129 (S), *ante*.

§ 2. **"In general terms."**—"A thing is always designated by (a) what is called a general name (that is, a name which is equally applicable to every member of a class) together with (b) some superadded description to show which member of the class is intended." For instance, 'A house,' 'an estate,' 'a farm,' 'a wood,' are all general names; each of them equally fits every member of a class (2).

§ 3. **Illustrations.**—In illustration (a) "a pair of carriage horses," or "a diamond ring" is in general terms. But in illustration (b) the bequest is not in general terms as the word "his" denotes, and therefore it does not come within the operation of this section.

(1) Wms. 1164.

(2) See *Interp. of deeds*, 153; sec. 129 (S), § 2 (a), *ante*.

The Hindu Wills Act.

PART XXIV, (ACT X, 1865).

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

100. [159^(S)].—Where the interest or produce of a fund is bequeathed to any person, and the Will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

Bequest of the interest or produce of a fund.

Illustrations.

(a) A bequeaths to B the interest of his 5 per cent. promissory notes of the Government of India. There is no other clause in the will affecting those securities. B is entitled to A's 5 per cent. promissory notes of the Government of India.

(b) A bequeaths the interest of his $5\frac{1}{2}$ per cent. promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life, and C is entitled to the notes upon B's death.

(c) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

NOTES AND COMMENTARIES.

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|---|---|
| § 1. <i>The section.</i> | § 4. <i>Intention to give the corpus.</i> |
| § 2. <i>The rule embodied in the section.</i> | § 5. <i>"Interest or produce."</i> |
| § 3. <i>Indication of limited duration.</i> | § 6. <i>Miscellaneous.</i> |

Extent of the section.

This section is extended to the Hindus, &c.

§ 1. **The section.**—This section furnishes an example of the difference between a will and a deed, and shows how "estates of inheritance may be limited by will, without the use of any of the terms required for that purpose in limitations by deed." Thus "if a man devise the profits, use, or occupation of land, by this devise the land itself is devised" (1). This is a relic of the old Feudal law, "according to which the whole beneficial interest in land consisted in the right to take the rents and profits." (2)

(1) Shep. T. 437.

(2) 1 Jarm. 797, 4th Edn.

In England, therefore, a devise of the *rents and profits* being equivalent to a devise of the land itself, a devise of the *rents and profits* or of income, which, before the Wills Act (Stat. 1 Vict. C. 26) carried only a life estate, now carries the fee simple by virtue of section 28 of that Act, [corresponding to section 82 (s), *supra*] without any words of inheritance or limitation [*Mannox v. Greener*, L. R. 14. Eq. 456] (1). Thus it appears that this section is also based on the principle of section 28 of the English Wills Act like section 82 (S) *ante*, with which it may be compared.

This section does not apply where the will affords a clear indication of the testator's intention [*Mandakini Debi v. Arunbala Debi*, 3 Cal. L. J. 515].

§ 2. The rule embodied in the section.—This section recognizes the established rule that a gift of the dividends of a fund to a legatee is a gift to him of the fund itself [see *De Souza v. Vaz*; I. L. R. 12 B., 137 at 147]. It corresponds to the following passage in Williams' "Executors:"—"Where the 'interest' or 'produce' of a fund is bequeathed to a legatee, or in trust for him, *without any limitation as to continuance*, the principal will be regarded as bequeathed also" [*Elton v. Shephard*, 1 Bro. C. C. 532]. Thus an indefinite gift of the dividends confers the absolute property of the stock [*Page v. Leapingwell*, 18 Ves. 463] (2). In *Blann v. Bell*, (5 DeG. and Sm. 658, 663), however, Parker, V.-C., said, that the rule which gives an absolute interest in the funds, when there is a general gift of the income, is not a very strong one; and that in all such cases the Court is obliged to find out the meaning from the context (3). That is to say, it is always a question of construction whether "the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration,"—or whether the testator's intention is to give more than a life interest. It may be observed that illustration (c) shows that although the context speaks only of the interest or produce of fund, the intention of the Legislature is, that it should have reference not only to what may be described as a fund, but also to lands producing rents and profits [see *Hemangini Dasi v. Nobin Chandra Ghose*, I. L. R. 8 C., 788]. Thus, here also, as in England, gift of rents and profits or of income of land is equivalent to gift of the land itself [*Doe d. Goldin v. Lakeman*, 2 B. and A. 30; *Mannox v. Greener* L. R. 14 Eq. 456] (4).

§ 3. Indication of limited duration.—A direction by a testator, that immovable property should be retained in the hands of trustees appointed by the will, and that the balance of the rents and profits, after the payment of expenses should be used and enjoyed by the testator's son G, in such manner as he might think proper, with a provision empowering the sons of such son to call him to account for the management of the property on attaining the age of twenty-one years, and with a direct, though void, gift over to the grand sons of such son, confers only a life estate on G, and affords, indication of an intention on the testator's part, that the enjoyment of the bequest should be of a limited duration, within the meaning of this section [*Anand Rao Vinayak v. Administrator General of Bombay*, I. L. R. 20 B., 450; see *Vullubdas Damodhar v. Thucker Gordhandas Damodhar*, I. L. R. 14 B., 360. But see *Administrator General of Madras v. Money*, I. L. R. 15 M., 448, at 467 where the indication was held to be of an unlimited duration]. So the gift being one intended to take effect

(1) Hawk. 120, 139; 1 Jarm. 797, 4th Edn.; Theob. 368, 5th Edn.; Wms. 827, F. n.

(2) Wms. 827 F. n.; 1199; Hawk. 123, 124.

(3) Wms. 1200, F. n.

(4) Hawk. 120; Theob. 368, 5th Edn.; 1 Jarm. 797, 4th Edn.; Wms. 827, F. n.

after the death of the devisee, although such gift was void, it was held, this was an indication that the enjoyment should be for life only [*Damodardas Tapidas v. Dayabhai Tapidas*, I. L. R. 21 B., 1; *Karsandas Natha v. Ladkavahu*, I. L. R. 12 B., 185, 198]. In *Siva Rau v. Vitla Bhatta* [I. L. R. 21 M., 425], the absence of a power of alienation was treated as an indication of an intention that an absolute estate was not to be given. But this circumstance by itself is ordinarily insufficient [See *Sarada Sundari Dassi v. Kisto Jiban Pal*, 5 C. W. N. 300]. See sec. 82 (S).

§ 4. Intention to give the corpus.—The rule of construction is, to see whether the intention to give the *corpus* by giving the rents and profits, is, or is not, in conflict with the general intention to be gathered from the whole will [see *Hemangini Dasi v. Nobin Chandra Ghose*, I. L. R. 8 C., 788]. In *Shookmoy Dass v. Monohari Dassee* [I. L. R. 7 C., 269], such intention was not in conformity with the general intention of the testator, and it was accordingly held that no valid estate in the *corpus* was created. In that case, the testator directed that his estate should remain in tact, providing for religious services to be kept up by his family from the profits of the estate, his will being that “his heirs, sons, sons’ sons, great gaudsons, and so on in succession should be entitled to enjoy such profits.” In delivering the judgement of the Court, Mr. Justice Field observed: “The general intention which is obtainable from the whole instrument, is clearly not an intention to create a valid estate in the *corpus*, in favour of any individual, but to tie up such *corpus*, and to give the profits only to the male descendants of the testator: or, in other words, to create in the profits merely a sort of estate in tail male”. He accordingly held, the bequest was invalid. This decision was confirmed by the Privy Council [I. L. R. 11 C., 684; I. L. R. 12 I. A. 103].

In *Hemangini Dasi v. Nobin Chandra Ghose*, (*supra*), the testator after reciting the annual net profits of a certain estate to be Rs. 3,150, directed his trustees to pay the same to certain persons and their heirs for ever, in certain specific portions. This was held to amount to a gift of the *corpus* of the estate; that is, the gift of the share of the rents and profits amounted to a gift of a share in the *corpus* of the estate [*Mannox v. Greener*, I. L. R. 14 Eq. 456, followed]. In distinguishing this case from *Shookmoy Das v. Monohari Dassee* (*supra*), Mr. Justice Field said: “We there held (referring to Shookmoy’s case), that it was impossible to say that an intention by giving the rents and profits of the property, to give thereby the corpus itself was in conformity with the general intention to be gathered from the whole of the will taken together. In the case now before us it appears to us, that the intention to give the *corpus* by giving a share of the rents and profits is not in conflict with the general intention to be gathered from the whole will” (at P. 802). See *Goswami Shri Girdharji v. Madhowdas Premji* (I. L. R. 17 B., 600).

In *Akil Chandra Sen v. Rebati Raman Majumdar* [(1911) 14 Cal. L. J. 618], the testator dedicated by will all his properties to a deity, and directed that after deducting charges for management and Government revenue, one-fourth of the profits should be devoted to the worship of the deity, one-fourth, to the repair of the houses including those of the deity, and the remaining moiety should go to his heirs. The testator further directed that any of his heirs would be able to obtain from the manager his share of the profits, although he may “leave this house of mine and go abroad.” It was held, that the testator did not create a complete *debutter* of all his properties.

And as regards the moiety of the profits, it was held that the gift of a moiety of the profits or income, was equivalent to a gift of a moiety of the corpus, the

intention of the testator to give the corpus being manifested by the last or sixth clause of the will to the effect that, "an heir who goes away is not thereby to lose his share in the profits."

As to whether a bequest of income "for support," or "maintenance," amount to a gift of the *corpus*, see *Ashutosh Dutt v. Doorga Churn Chatterji* [L. R. 6 I. A. 182; 5 C. L. R. 296; I. L. R. 5 C., 438], *Bhoobun Mohini Dehya v. Hurrish Chunder Chowdhry* [I. L. R. 4 C., 23; L. R. 5 I. A. 138; 2 C. L. R. 339], and *Jogeswar Narain Deo v. Ram Chand Dutt* [L. R. 23 I. A. 37; 6 M. L. J. 75; I. L. R. 23 C. 670]. See sec. 82 (S), *ante*.

§ 5. "Interest or produce."—It has already appeared that, "interest and produce" include *rents and profits* (*Deo d. Goldin v. Lakeman*, 2 B. & Ad. 30), as well as *income* [*Mannox v. Greener*, L. R. 14 Eq. 456.] of land (1).

In *Mannox v. Greener* (*supra*), Sir R. Malins, V.-C., said, "that there was no distinction between giving the income of the land and the rents and profits of the land, and that a gift of the income of the land unrestricted is simply a gift of the fee-simple of the land" [see *Shookmoy Dass v. Monohari Dassee*, I. L. R. 7 C. 269, at 279].

In England, a question was raised, whether in a devise of *rents and profits*, the words "rents and profits" meant the annual income only, according to their ordinary popular signification, or something more comprehensive, as including "the proceeds or 'profits' of the inheritance, and, therefore, as impliedly conferring a power to dispose of such inheritance;" and it was decided that such a devise did confer a power of sale, so that the said words, in the absence of other words to restrain the meaning, were to be understood as not to be confined to the receipt of the rents and profits as they accrued, *i.e.*, to rents and profits as mere *annual* rents, but that they were intended to signify a power even to raise money out of the estate, by sale or mortgage [see *Trafford v. Ashton*, 1 P. W. 415; *Bootle v. Blundell*, 1 Mer. 232; *Green v. Belcher*, 1 Atk. 506; *Allan v. Backhouse*, 2 V. & B 65] (2). Thus it seems to follow that this section, by the use of the words "interest or produce," is intended to comprise the following rule in addition to what has already appeared:—"A trust to raise and pay money out of the 'rents and profits' of land is sufficient to create a charge on the *corpus* of the land, where the purpose of the trust requires it, unless the context shows that 'rents and profits' mean only '*annual*' rents and profits" [*Trafford v. Ashton*, *supra*] (3).

In this connection Mr. Jarman says:—"But perhaps it more accords with the principle of the authorities to say, that the signification of the phrase 'rents and profits' is governed wholly by the nature of the purpose for which the money is to be raised, and the general tenor of the will" (4).

It has been held in England, that a devise of the 'free-use,' or of the 'use and occupation' of land, passes an estate in the land, unless the context clearly calls for a more limited construction [see *Cook v. Gerrard*, 1 Saund. 181; *Mannox v. Greener*, L. R. 14 Eq. 456; *Rabbeth v. Squire*, 19 Beav. 70] (5).

(1) Hawk. 120; 1 Jar. 797, 4th Edn.; Theob. 368, 5th Edn.; Wms. 827, F n.

(2) Hawk. 120, 121; 2 Jar. 610, 611, 4th Edn.

(3) Hawk. 120.

(4) 2 Jar. 612, 4th Edn.

(5) 1 Jar. 798, 4th Edn. Theob. 150, 3rd Edn.

But a devise of a specific annual sum out of land, though it happens to be the whole amount of the rents and profits, will not pass any estate in the land [*Going v. Hanlon*, I. R. 4 C. L. 144; see however, *Hemangini Dasi v. Nobin Chunder Ghose*, I. L. R. 8 C., 788] (1).

§ 6. **Miscellaneous**—There is a distinction between the gift of the produce of a fund without limit as to time and a simple gift of an annuity. In the ordinary acceptation of the term *annuity*, “if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of 100*l.*; that is, of as many sums of 100*l.* as the donee shall live years” [*Blewitt v. Roberts*, Cr. & Ph. 274, 280] (2). See sec. 160 (S), *infra*.

(1) Theob. 368, 5th Edn.

(2) Wms. 1200; Hawk. 125.

The Hindu Wills Act.

[PART XXV, ACT X, 1865].

OF BEQUESTS OF ANNUITIES.

101. [160 (S)].—Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will. And this rule shall not be varied by the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Annuity created by will payable for life only, unless contrary intention appears by will.

See *post*, Sec. 123 (1').

Illustrations.

(a) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(b) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(c) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death (1).

NOTES AND COMMENTARIES.

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| § 1. <i>Preliminary.</i> | § 4. <i>"And this rule shall not be varied, &c."</i> |
| § 2. <i>Annuity where for life only.</i> | § 5. <i>Suit for annuity.</i> |
| § 3. <i>"Contrary intention."</i> | § 6. <i>Miscellaneous.</i> |

Extent of the section.

This section applies to the Hindus, Jainas, &c., and also to the Parsees.

§ 1. **Preliminary**—By an annuity is meant a periodical payment, made annually, or at more frequent intervals, either for a fixed term of years, or during the continuance of a given life, or a combination of lives (2). An "annuity,"

(1) See Theob. 447, 5th Edn.; Wms. 1200.

(2) Encyclo. Brit., 10th Edn.

according to English law, is a species of personal property of a somewhat peculiar character (a). Strictly speaking, it is a yearly payment of a certain sum of money, granted to another in fee, for life, or for years, charging the person, or both person and estate of the grantor. Or, it may be said to denote any yearly payment granted out of any kind of property. All authorities, however, seem to agree that an annuity is not charged on real estate, although it may be limited to the heirs, or the heirs of the body of the grantee. Mr. Justice Williams says: "an annuity partakes of the nature of real property: viz., that when granted *with words of inheritance*, it is descendible, and goes to the heir, to the exclusion of the executor. Unless, however, words of inheritance are employed in the grant, it has been held that the annuity will pass to the executors. As where a testator gave his real and personal estate to his wife, subject, amongst other bequests, to an annuity of 50*l.* to A B *for ever*; and it was held that for the want of the word *heirs* in the gift, the annuity passed, on A B's death, to his personal representative" (1).—Wharton defines *annuity* to mean a periodical payment of money either bequeathed as a gift, or secured by the personal covenant or bond of the payer. An annuity thus "concerns no land" (2). When an *annuity* is charged upon land, it is called a 'rent-charge,' (b) and is regarded as real property (3). But an annuity, though given with words of inheritance is, for all purposes other than descent, a personalty [*Earl of Stafford v. Buckley*, 2 Ves. sen. 170; *Aubin v. Daly*, 4 B. and Ald. 59].

An annuity created by will, is a legacy. In other words, "the term '*legacy*' *prima facie* comprehends annuities, and '*legatee*' includes an annuitant." The word *annuity* in a will is equivalent to a legacy in the absence of a contrary intention apparent on the face of the will [*Sibley v. Perry*, 7 Ves. 522; *Nannock v. Horton*, *Ibid.* 391; *Heath v. Weston*, 3 De. Gex., M. & G. 601; *Bromley v. Wright*, 7 Harc. 334] (4).

§ 2. **Annuity where for life only**—The question whether an annuity given by will is perpetual or for life only, depends, broadly speaking, upon the intention of the testator. Where there is no reference to the fund out of which the annuity is payable, the rule is, that a simple gift of an annuity to A. does not give an annuity beyond the life of A. In other words, an annuity

(a) In England an annuity is resorted to as a means of borrowing money, often where the borrower has no better security to offer. This is done by the borrower undertaking to pay an annuity during his own life, instead of interest and the return of the loan. In such cases the borrower is the grantor and the lender the grantee of such annuity (5).

(b) 'Rent charge' "is a rent, or sum payable periodically, as a charge or burden on the ownership of land, and not as a service incident to tenure, and for arrears of which a remedy by distress is available" (6).

A rent-charge being a burden imposed upon and issuing out of *lands*, is distinct from an annuity, which is a yearly sum chargeable only upon the *person* of the grantor. "Therefore, if a man by deed grant to another the sum of 20*l.* per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity" (7).

(1) Wms. 816; Wms. P. P. 160; Flood. 194.

(2) Wharton Art. 'Annuity'; Wms. 816.

(3) Flood. 194.

(4) Hawk. 298; 2 Jarm. 609 4th Edn; Wms. 1202, F.n., Flood. 50.

(5) Wharton, art. "Annuity."

(6) Edw. L. of Pro. 278. See 1 Steph. 674; 2 Black. 36.

(7) 1 Steph. 674-75; 2 Black. 35; Theob. 442, 5th Edn

given *simpliciter*, passes only a life interest [*Blewitt v. Roberts*, 1 Cr. & Ph. 274; *Yates v. Maden*, 3 Mac. & G. 532] (1). Thus, the presumption is, that a simple gift of an annuity is for life only as this section provides; and this presumption holds good whether such annuity is given to a single legatee, or to A. for life, and then to B. simply, or to A. with power to give it after his death to another, or to several others and the survivor. Unless, therefore, a contrary intention appears by the will, or unless there are circumstances sufficient to show an intention to give the annuity indefinitely, the subsequent takers, as well as the first annuitant, will take for life only [see *Gopal Krishna v. Ramnath* 5 Bomb. L. R. 729; *Potter v. Baker*, 13 Beav. 373; *Blewitt v. Roberts*, *supra*; *Yates v. Maden*, *supra*] (2).

Accordingly, where an annuity is given to A. for life, and after his decease to B., the fact that the annuity extends beyond the life of the first taker, does not constitute a circumstance sufficient to render it perpetual [*Gopal Krishna v. Ramnath*, *supra*]. Nor can the annuity be held to be perpetual where it is given to A. for life, on condition that, if he should die leaving a child, the annuity is to be *continued* for that child's use and benefit [*Yates v. Maden*, *supra*]. So, where an annuity was given to A. for life, and after his decease it was to be equally divided between B., C., and D., or the survivor or survivors of them, it was held that the legatees in remainder took annuities only for their respective lives [*Blewitt v. Roberts*, 1 Cr. & Ph. 274] (3).

An annuity given for education and maintenance cannot endure beyond the life of the annuitant. Such an annuity is not to be limited to minority, but it creates a life-interest [*Wilkins v. Jodrell*, L. R. 13 Ch. D. 564; *In re Booth*; *Booth v. Booth*, (189) 2 Ch. 282]. Nor is such annuity, if given to a person for a fixed period, as for the life of a certain person, to be determined by the death of the annuitant before that period [*In re Ord*; *Dickinson v. Dickinson*, L. R. 9 Ch. D. 667; 12 Ch. D. 22] (4).

It has already appeared that a simple gift of the annual proceeds of a specified fund, passes the absolute interest to the legatee without words of limitation [see sec. 159 (S), § 2 *supra*] (5). But when such gift is, in its terms, simply a gift of *so much a year*, its effect is to give an annuity for life only, the gift "of so much a year" constituting an annuity. Thus where a testator directs to invest a sum of money in Government securities sufficient to produce a certain annual income, and such income is given to a legatee, the gift is an annuity and only a life interest passes [*Arnold v. Kayess*, 51 L. J. Ch. 721] (6). So where a testator, after providing for his debts, &c., directed his property to be disposed of and the proceeds to be placed in certain Bank, with power to the executors to invest the same on mortgages, and then gave the following directions: "That a monthly stipend of Rs. 15, be paid to my daughter E. S. for her own benefit, and Rs. 20, for the benefit of her two children during their minority. In like manner my daughter M. D. to be allowed by my executors monthly the sum of Rupees 20 for her own benefit, and Rupees 50 for the benefit of her five children during their minority." It was held that the annuities to E. S. and M. D. were annuities for their respective lives, and that

(1) Wms. 1200; Hawk. 125; 2 Jarm. 398, 4th Edn.; 2 W. & T. L. C. 252.

(2) Wms. 1200; 2 W. & T. L. C. 252; Theob. 447, 5th Edn.

(3) Hawk. 128.

(4) Hend. 297; Theob. 449, 5th Edn.

(5) Wms. 1200; 2 Jarm. 397-98, 4th Edn.

(6) Hend. 297; Theob. 448, 5th Edn.

both annuities were charged on the testator's estate [*Agnew v. Mathews*, 1 M. H. C. R. 17. *In re Graves' Trust*, 28 L. J. Ch. 536, referred to].

In *Narayani Dasi v. Administrator General of Bengal* (I. L. R. 21 C., 683), an annuity for maintenance, that is, a separate allowance for maintenance apart from what the testator had already given, was, regard being had to the provisions of the will, held to be payable if only the annuitant was otherwise unprovided for. The facts were these: The testator, after giving an annuity of Rs. 5 per month to his daughter, Narayani Dasi, the plaintiff, by the 6th clause of his will directed as follows:—"to make over and convey the rest and residue of my estate, moveable and immoveable, with all accumulations and additions, to the said B. N. M. and his heirs on his attaining majority, subject nevertheless to the trust of maintaining my said daughter, and the payment of the annuities hereinbefore mentioned, and subject also to the following conditions and limitations, that is to say:—"In case the said B. N. M. should die without issue and before attaining majority, I direct that my residuary estate shall pass to my said two daughters and their heirs absolutely in equal shares subject to the payment of the said annuities." This being so, the plaintiff sued for the construction of the will, praying amongst others, that, under the above clause she may be declared entitled, as of right, to maintenance out of her father's estate. The question, therefore, turned upon the meaning of the words "subject nevertheless to the trust of maintaining my said daughter," or, "whether," as Mr. Justice Prinsep said, "the plaintiff was entitled to any separate maintenance by a specific sum of money;" and it was held, that she was not entitled to anything by way of separate allowance for maintenance, but that, she was only entitled under the will (apart from her annuity of Rs. 5 a month) to be provided for in case she were otherwise unprovided for.

§ 3. "Contrary intention."—In England, "where there is a gift of an annuity, not out of property generally, but out of property to produce it, the annuity is perpetual." That is to say, where the bequest is in effect a gift of the *produce of a fund*, or a gift of property which will produce the amount of the annuity, the case is assimilated to that of a gift of the income of a fund without limit as to time, and the annuity is perpetual (1). In *Lett v. Randall* [2 De G. F. and J. 392], the rule is given in these words: "To make an annuity, created by will, perpetual, there must be express words in the will so describing it, or the testator must by some language in the will indicate an intention to that effect. The most common indication is a direction by the testator to segregate and appropriate a portion of his property from the interest or profits of which the annuity is to be paid. Where this is done, the annuity when mentioned in the will represents the *corpus* so appropriated, and the *corpus* passing by the bequest of the annuity, the annuity may be said to be perpetual." Thus, a gift of "2,000 Rs. a year, being part of the moneys I have in the bank of Bengal shares" [*Rawlings v. Jennings*, 13 Ves 39], or a bequest of 1,600 Rs. per annum, that is, the interest of 40,000 Rs. of my 4 per cent. Government paper [*Stretch v. Watkins*, 1 Mad. 253], would give a perpetual annuity. See *Bignold v. Gibs* [1 Drew. 343] (2).

A "contrary intention" may also be expressed by such limitations as are inconsistent with a mere life interest; as, "where the will deals with the annuity as being in existence and operative beyond the period of the life of him who is first to enjoy it, and no other period can be fixed for such further

(1) Hawk. 125; Hend. 296, Wms. 1201; Theob. 447, 5th Edn.

(2) Hawk. 126; Theob. 447, 5th Edn.; Wms. 1201.

duration short of making it perpetual." Thus where the gift was "to A 50*l.* a year for her and her children, and after her decease the money to each of them at 21," the annuity was held to be perpetual [*Potter v. Baker*, 13 Beav. 273; *Robinson v. Hunt*, 4 Beav. 450.]. But no particular words of limitation are necessary to make an annuity perpetual; so that where the annuity was given to A. for life, and after her decease to her children as tenants in common, with a direction, that on the youngest son attaining 21, the said annuity should be sold, and the proceeds divided among the children; it was held that the annuity was perpetual, because "it would be absurd to suppose that it is to cease upon the death of prior annuitant and to revive again in certain events" [*Mansergh v. Campbell*, 3 De G. and J. 233, 237; *Garden v. Meagher*, L. R. 1 Eq. 246; *Stokes v. Heron*, 12 Cl. and F. 161; *Hicks v. Ross*, L. R. 14 Eq. 141] (1). The fact that an annuity is charged on the revenues of a village, does not serve as an indication of an intention to create an annuity as co-equal in duration with the property itself [*Gopalkrishna v. Ramnath*, 5. Bomb. L. R. 729].

§ 4. "And this rule shall not be varied, &c."—This clause is at variance with the English law according to which, where a particular sum is bequeathed to be invested in the purchase of an annuity, the annuitant is entitled to a perpetual annuity, or, what comes to the same thing, to the particular sum so invested [*Kerr v. Middlesex Hospital*, 2 De G. M. and G. 576; *Ross v. Borer*, 2 J. and H. 469] (2). This is so on the principle of section 125 (S) *ante* (see next section). But in this country, under this clause, the mere circumstance that a sum of money is bequeathed to be invested in the purchase of an annuity, will not make it perpetual.

This clause makes the rule less favourable to the annuitant than the English law. "On principle, however, it is difficult to see in what respect a direction to purchase an annuity can be distinguished from a mere gift of an annuity" (3).

§ 5. **Suit for annuity.**—A suit to recover arrears of annuity payable under a will and assented to by executors, is cognizable by the Presidency Small Cause Court. Such a suit is not one for enforcing a trust, but it is one for money had and received by the defendant for the use of the plaintiff [*Dossibai v. Cooverbai*, 32 B., 575; 10 Bomb. L. R. 758]. See Act XV, 1882, sec. 19 (K).

§ 6. **Miscellaneous.**—Where a personal annuity (a) is given to A. during the life of B, if A dies in B's lifetime the annuity does not expire, but goes to A's representative [*Savery v. Dyer*, Amb. 139] (4).

A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee under the will, or for his trouble, ceases with the active

(a) "A personal annuity" is that which issues out of personalty and not realty [see *Re Ashwell's Will*, Johns 112]. When charged upon land, it is either real or personal at the election of the holder, for he may proceed for its recovery either against land or person. The word *personal*, therefore, indicates the remedy for unpaid annuity, and not only the source whence it is derived (5). A personal annuity of inheritance will pass under a general bequest [*Aubin v. Daly* 4 B. and Ald. 59].

(1) Hawk. 128, 129; Theob. 447, 5th Edn.; Hend. 296; Wms. 1201.

(2) Hawk. 127; Wms. 1201-2; Theob. 448, 5th Edn.

(3) Theob. 367, 3rd Edn.

(4) Hawk. 125.

(5) Flood 201.

trusts, not necessarily with a judgment for administration. Thus where a testator directed a certain sum to be paid to one of his executors in consideration of his trouble, until a final settlement of his affairs should take place, and the executor proved the will and acted, and sometime after the testator's death a suit for administration of his estate was instituted, but no receiver appointed, though some of his assets were still outstanding, it was held that the annuity did not cease on account of the institution of the suit [*Baker v. Martin*, 8 Sim. 25; *Hull v. Christian*, L. R. 17 E. 54 6q](1).

102. [161 (S)].—Where the will directs that an annuity

Period of vesting
where will directs
that annuity be pro-
vided out of proceeds
of property, or out of
property generally,
or where money be-
queathed to be in-
vested in purchase
of annuity.

shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of an annuity for any person, on the testator's death the legacy vests in interest in the legatee, and

he is entitled at his option to have an annuity purchased for him, or to receive the money appropriated for that purpose by the will.

Sec *post*, sec. 123 (1') and sec. 303 of the Succession Act.

Illustrations.

(a) A by his will directs that his executors shall out of his property purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity (2).

(b) A bequeaths a fund to B for his life, and directs that after B's death it shall be laid out in the purchase of an annuity for C. B & C survive the testator. O dies in B's lifetime. On B's death the fund belongs to the representative of C.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Illustration (a)*

§ 3. *Illustration (b)*

§ 4. *Where annuity cut short.*

Extent of the section.

This section is extended to the Hindus, Jains, Sikhs and Buddhists.

§ 1. **The section.**—This section is based on the principle which is applied in cases of bequests for the benefit of persons, containing a direction that they should be applied or enjoyed in a particular manner. In such cases, if the purpose of the bequest is the sole benefit of the legatee, he will be entitled

(1) Wms. 1292; Theob. 372, 3rd Edn.; T. L. Lect. (1881) 249.

(2) See § 2. *Infra*.

to receive the money regardless of the particular modes directed for the enjoyment or application (1). [See section 125 (S) *ante*]. This rule is so jealously observed that, even where the testator expressly declares that the legatee shall not be permitted to receive the money, the Court will hold such declaration inoperative [*Re Mabbett*, (1891) 1 Ch. 707]. Thus in *Stokes v. Cheek* [29 L. J. Ch. 922; 29 Reav. 620], Romilly, M. R., directed the price of the annuity to be paid over to the annuitant, observing—"It is a useless form to direct a purchase if the annuity is to be sold again" (2).

Where R. by his will directed his trustees, out of the proceeds of sale and conversion of his estate and after payment of his debts and testamentary expenses, to purchase in the name of his wife a Government annuity of 400*l.* for her life, and the wife survived the testator but died within 16 days before the will was proved or any debts paid, it was held, that the annuity and the right to take its value in cash instead of the annual payment, vested in the widow on the testator's death, and therefore her legal personal representatives were entitled to the sum which at the date of the testator's death would have purchased the annuity [*In re Robbins*; *Robbins v. Legge*, (1906) 2 Ch. 648; (1907) Ch. 8 (C.A.)].

§ 2. Illustration (a).—This is *Palmer v. Craufurd* (3 Swanst. 417, 488) which establishes the principle that the legatee for whose benefit a gift of money is intended, may, if he survive the testator, elect either to take the sum, or to have it laid out in an annuity (3).

§ 3. Illustration (b).—This illustration embodies the result of the cases of *Bayley v. Bishop* (9 Ves. 6) and *Day v. Day* (1 Drew. 569). These cases lay down that, where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even before the fund is available, as during the life of the person after whose death the investment is to be made, still it is a vested legacy, from the death of the testator, and the sum will belong to the personal representatives of the legatee (4). And if the legatee for whose benefit it was intended survived the testator, he may elect either to take the sum [*Stokes v. Cheek*, *supra*], or to have it laid out in an annuity [*Dawson v. Hearn*, 1 Russ and M., 606, 608; see *Kerr v. Middlesex Hospital*, 2 D.M. and G. 584].

§ 4. Where annuity cut short.—In such a case the legatee is not entitled to receive the capital money if there is a conditional limitation cutting short the annuity on the happening of a specified event [*Halton v. May*, 3 Ch. D. 148].

103. [162 (S)].—Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

Abatement of annuity.

- (1) Wms. 1033, 10th Ed.; 1 Jarm. 396-97, 4th Edn.
- (2) 1 Jarm. 397, 4th Edn.; Theob. 365 3rd Edn.; 444-45. 5th Edn.; Hend. 298.
- (3) Wms. 946, 10th Edn. Theob. 346, 3rd Edn.; 444, 5th Edn.
- (4) Wms. 946, 10th Ed. Theob. 364, 3rd Edn.; 444, 5th Edn.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 4. <i>Annuities to become payable.</i> |
| § 2. <i>Annuities and general legacies.</i> | § 5. <i>The process.</i> |
| § 3. <i>English practice for valuing annuity.</i> | |

Extent of the section.

This section is extended to the Wills of Hindus, Jains, &c.

§ 1. **The section.**—This is in accordance with the rule laid down in *Hume v. Edwards* (3 Atk. 693), *Lewin v. Lewin* (2 Ves. Sim. 417) and other English cases (1). In *Milner v. Huddleston* [4 Mac. and G. 523] (2), the rule was thus explained by Lord Cottenham:—"The reason is, that the testator, in the absence of clear and conclusive proof to the contrary, must be deemed to have considered that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency by giving a priority in case of a deficiency, to some of the objects of his bounty." The principle will equally apply whether the annuity is to commence immediately on the death of the testator, or at a future period (3), or whether the legacies be immediate or on the death of the annuitant (*Street v. Street*, 2 N. R. 56) (4). And if annuities abate with reference to other legacies, they must, of course, abate between themselves (*Innes v. Mitchell*, 2 Phill. Ch. C., 346) (5).

§ 2. **Annuities and general legacies**—As a rule, annuities and general legacies stand upon an equal footing, and on a deficiency of assets they abate proportionally [see *post* sec. 107 (1) and 111 (1)]. "In such cases a value is put upon the annuity, and then a proportional abatement is made between the annuity and the legacies, and then the annuitant (although it is only a life annuity), or his representative, if he be dead, is entitled at once to receive a sum equal in amount to the valuations so abated" [*Carr v. Ingleby*, 1 DeG. and Sm. 362; *Long v. Hughes*, *Ibid* 364; *Wroughton v. Colquhoun*, *Ibid* 357] (6).

§ 3. **English practice for valuing annuity**—The value, in England, is ascertained thus: "If all the annuitants be living at the period of division, the value must be ascertained at the death of the testator. If they be all dead, the value must be taken to be the respective amounts of arrears; but if some be dead and others living, the value, as to the former, will be taken at the amount of their arrears, and as to the latter at the amount of their arrears added to the calculated value of the future payments" (*Todd v. Bielby*, 27 Beav. 353) (7). In the case of a reversionary annuity which has come into possession, the value must be taken to be the present value of the annuity added to the amount of arrears due since it came to possession (*Potts v. Smith*, L. R. 8 Eq. 683) (8).

§ 4. **Annuities to become payable.**—Annuities to become payable when all the legatees are paid, and annuities payable immediately, abate *pari passu* [*i.e.* by the same gradation, or equally] (*Ingham v. Daly*, 9 L. R. Ir. 484) (9).

(1) See Wms. 1373.

(2) Wms. 1373.

(3) Wms. 1373.

(4) *Ibid*.

(5) See *post* sec. 107 (P), § 3.

(6) 2 W. and T. L. C. 287; Wms. 1373, F. n.; Theob. 446. 5th Edn.

(7) See Theob. 737-38, 5th Edn.

(8) *Ibid*.

(9) Theob. 39, 5th Edn.

§ 5. The process.—As to the process for arriving at the capitalized value of an annuity, see *In the goods of Rushton* (L. L. R. 3 C., 736). See sec. 111 (P) *post*.

104. [163 (S)].—Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

Where there is a gift of an annuity and a residuary gift, the whole of the annuity to be first satisfied.

NOTES AND COMMENTARIES.

§ 1. *The general rule.*

§ 2. *Where annuities directed out of income become charge on the corpus.*

Extent of the section.

This section is extended to the Hindus, Jains, &c., and to the Parsees.

§ 1. The general rule.—“The general rule is, that if there be a clear gift of a life-interest and a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest. But if there is a gift of an annuity, and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee” [*Croly v. Weld*, 3 De G. M. and G. 993]. The reason is, that a residuary legatee is entitled to nothing until the general legacies are fully satisfied (*Ibid*); and, as seen in the last preceding section, for purposes of abatement, annuities are treated as general legacies (1). See sections 107 (P), 118 (P), 119 (P) and 121 (P), *post*.

§ 2. Where annuities directed out of income become charge on the corpus.—A testator directed a conversion of all his estate and then gave annuities out of the income, and subject to such annuities he gave his estate absolutely to his brother. The income proving insufficient for the payment of the annuities in full, it was held, they were a charge on the corpus. The principle laid down by Cozen Hardy, M. R., is this: If you find a trust to pay out of income an annuity and nothing either in the express terms of the will or upon construction to determine the time during which the income available for payment of the annuity is limited, then it may be a continuing charge. A mere trust for the payment of an annuity is not necessarily a trust to pay the annuity only out of income accruing during the life of the annuitant. If, however, you find a trust to pay out of income with no such limit * * * and then a disposition of the estate subject to the annuity, that charges the annuity upon the corpus of the estate just as much as a gift of real estate, subject to the payment of the testator's debts, charges the debts upon the real estate [*In re Haworth*; *Howarth v. McKinson* (1909) 2 Ch. 19 (C. A.)].

The Hindu Wills Act.

PART XXVI, (ACT X, 1865).

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OF LEGACIES TO CREDITORS AND PORTIONERS.

105. [164(S)].—Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

Creditor *prima facie* entitled to legacy as well as debt.

NOTES AND COMMENTARIES.

§ 1. *Preliminary.*
§ 2. *The section.*

§ 3. *"Satisfaction."*
§ 4. *Where legacy not meant satisfaction.*

Extent of the section.

This section is applicable to the Wills of Hindus, Jinas, &c.

§ 1. Preliminary.—It is a rule in the English Courts of Equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of his debt, it shall be presumed, in the absence of anything to the contrary, that the legacy was meant by the testator as a satisfaction of the debt [*Brown v. Dawson*, Prec. Chanc. 240; *Talbot v. Shrewsbury*, *Ibid.*, 394; *Fowler v. Fowler*, 3 P. Wms. 353]; but that where the legacy is of less amount than the debt, it shall not be deemed a part payment in satisfaction [*Graham v. Graham*, 1 Ves. Sen. 263]. This rule, however, though it has long prevailed, has met with the censure of several eminent Judges, and the Courts in England have inclined to lay hold of any minute circumstance whereupon to ground an exception to it (1). [See *Re Rattenberry* (1906) 1 Ch. 667].

This being so, the Law Commissioners in their report on the Bill which eventually became the Indian Succession Act, say:—

"Here, as elsewhere, we have departed from the English law, where its provisions appeared to us to be objectionable in themselves, or especially inapplicable to India. Above all things, we have aimed at giving effect to the plain meaning of the words of the testator, without endeavouring to do, or say for him, that which he has not done, or said, for himself."

Law Commissioners' report.

"We have accordingly discarded the rules by which the English Courts are compelled to presume, in the absence of any intimation to the contrary,

§1) See Wms. 1302 and F. N. 1303; Hawk. 299; Theob. 672, 5th Edn.

that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, the legacy is meant by the testator to be a satisfaction of the debt; that where parent [sec. 165 (S)] who is under a legal obligation to provide a portion for his child, fails to do so, and afterwards bequeaths a legacy to the child, the legacy is meant to be a satisfaction or fulfilment of the obligation."

"We have in like manner, discarded [sec. 166 (S)] the rule of English law, that where a father bequeaths a legacy to a child and afterwards advances a portion for that child, he thereby adeems the legacy. We have endeavoured so to frame the law in this respect as to prevent the occasion from ever arising, which in England requires a nice balancing of judgment, a large discretion, the prosecution of a difficult enquiry, and the admission of parol evidence of the intentions of the testator" (1).

§ 2. **The section.**—So far as bequests to creditors are concerned, the suggestions of the commissioners are carried into effect by this section. Accordingly, a creditor in this country to whom a legacy is given, is *prima facie* entitled to the legacy as well as the amount of the debt. That is to say, no presumption of satisfaction is to be raised as it is done in England, where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt. In other words, as Mr. Justice Beaman says, the doctrine of satisfaction has been expressly abolished in this country by this section. In this country and under this section, the rule for the guidance of the Court in such cases, is, to "give effect to the plain meaning of the words of the testator, without endeavouring to do, or say for him, that which he has not done, or said for himself." Thus where the testator, a Khoja Mohamadan,* being indebted to his brother, H. M., the plaintiff, to the extent of Rs. 9,000, bequeathed to him an equal amount in these words, "To my brother, H. M., I give Rs. 9,000, as *Bakshis* (Hiba), and the plaintiff claimed the legacy as well as the debt, it was held, that he was entitled to both [*Hassonally Moledinn v. Papatlal Parbhudas* (1912) I. L. R. 37 B., 211; *Pestonje v. Framji* (1910) 12 Bomb. L. R. 863, followed in principle].

§ 3. **Satisfaction.**—"Satisfaction" may be defined to be the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some existing claim which the donee has upon the donor (2).

The general rule with respect to the satisfaction of debts by legacies is, that where a testator gives to a creditor a legacy of equal or greater amount, that is a satisfaction of the debt; but for this purpose the legacy must take effect at the same time as the debt is payable.

* Notwithstanding some doubt as to whether the Khojas of Bombay are governed by Hindu Law, Mr. Justice Beaman has applied this section in this case, observing that, "although the Indian Succession Act does not apply to Hindus, Mahomedans or Buddhists, it cannot be doubted that it was the intention of the Legislature to announce what they considered to be a generally correct principle of interpretation universally applicable unless overridden by some special provision of local law or usage" [*Hassonally Moledina v. Papatlal Parbhudas*, *supra*, at p. 214]. His Lordship further observed to the effect that if the Mahomedan law was to be applied to the case, the will would have to be interpreted in accordance with the provisions of the general law of evidence and in particular by the provisions of section 92 of the Indian Evidence Act.

(1) Gazette of India, July 1st 1864, p. 54.

(2) Story, Eq. Jur. § 1099; Jarm. 1156, 6th Ed.

A testator left a legacy of £400 to his creditor, but fixed no time for its payment. Under the law the legacy was not payable until twelve months after the death of the testator [sec. 117 (P), *post*]. There was a debt of £300 owing to the creditor by the testator payable within three months after his death. It was held that the legacy was not to be taken as given in satisfaction of the debt [*In re Harlock*; *Calham v. Smith* (1895) 1 Ch. 516].

§ 4. Where legacy not meant satisfaction.—In the following cases the legacy was held not to mean satisfaction of the debt: Where the legacy was for a less amount than the debt [*Reynolds v. Robinson*, 82 N. Y. 103; *Deichman v. Arndt*, 49 N. J. Eq. 106]; where not payable soon [*Calham v. Smith*, 64 L. J. Ch. 325; *Clark v. Sewell*, 3 Atk. 96]; where the legacy was contingent [*Stewart v. Conrad*, 100 Va. 128]; where it was uncertain in amount like a residue (*Ibid*); where of a different nature [*Deichman v. Arndt*, *supra*; *Huston v. Huston*, 37 Iowa 668]; where not directly to the creditor [*Reynolds v. Robinson*, *supra*]; where it was given before the debt was contracted [*Heisler v. Sharp*, 44 N. J. Eq. 167]; where it became liquidated [*Reynolds v. Robinson*, *supra*; *Glover v. Patten*, U. S. 394].

106. [165(S)]—Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Child *prima facie*
entitled to legacy as
well as portion.

Illustration.

A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

NOTES AND COMMENTARIES.

1. *Portion.*

§ 2. *Person in loco parentis.*

§ 3. *Portion and advancement.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus Jains, &c.

§ 1. Portion.—A “portion” is a provision secured in any way to a child by a parent, or by some other person standing *in loco parentis*; and such child

is called *Portioner*. The term properly designates only gifts or settlements made by and for others standing in this relation to each other and not gifts to *strangers*, that is, persons who are not legitimate children of the donor or settlor, or children to be benefited by the person *in loco parentis* (1). Or, in short, *portion* is that part of a person's estate which is given or left to a child (2).

See Law Commissioners' Report in sec. 164 (S), *supra*.

§ 2. Person in loco parentis.—A person in *loco parentis* to a child is, a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child (*Powys v. Mansfield*, 3 Mylne and Cr. 359). In other words, a person who assumes the parental duty to provide for the child, is one in *loco parentis* to that child. "The test seems to be whether the circumstances, taken in the aggregate, amount to a moral certainty that the testator considered himself in the place of the child's father" (3). A grand-father making provision for his son's daughter, a minor, the son being alive, is not a person in *loco parentis* to that daughter [see *Jugjivandas Karamchand v. Brijdas Lalji*, 7 Bomb. L. R. 299].

§ 3. Portion and advancement.—There is a distinction between *portion* and *advancement*. See sec. 42, Succession Act. As to what is an *advancement* (see *Ibid*).

107. [166 (S)].—No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

No ademption by subsequent provision for legatee.

Illustrations.

(a) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. *The legacy is not thereby adeemed.*

(b) A bequeaths 40,000 rupees to B, his orphan niece, whom he had brought up from her infancy. Afterwards, on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. *The legacy is not thereby diminished.*

NOTES AND COMMENTARIES.

§ 1. *Rule of English law.*

§ 2. "*Ademption*" and "*Satisfaction*."

§ 3. *Application of the rule to Hindu Wills.*

Extent of the section.

This section is applicable to the Hindus, &c.

§ 1. Rule of English law.—"If a child be provided for by his father by gift or settlement, and he afterwards bequeaths to the same child a legacy equal or nearly so, as to its various incidents, to the amount previously secured, then in the absence of a contrary intention appearing in his will, this legacy

(1) Flood. 51.

(2) Wharton. L. Lex.

(3) Rood, § 726, note.

Satisfaction of Portion by legacy.

must, according to the present state of the law, be strongly presumed to be meant as a substitution of the former provision, or as it is technically called, a *Satisfaction of the Portion*. In other words, a *prima facie* presumption arises that the father did not intend to confer a two-fold benefit; hence the dictum that Equity leans against double portions." [See *Ex parte Pye*, 18 Ves. 153] (1).

Satisfaction of legacy by Portion.

"Conversely,.....when a legacy is in the first instance stated in some existing will as bequeathed by a father to a child, and subsequently a gift or other provision is made *inter vivos* with a view to benefit the same child, this legacy after the testator's death is regarded as a *portion*, and is said to be adeemed by the second gift, &c., that is to say, it is satisfied thereby, although of course as before, only in the absence of a contrary intention clearly apparent." (*Ibid.*) (2)

But "where the gift by the will and the *portion* are not *ejusdem generis* (3), the presumption will be repelled. Thus land will not be presumed to be intended as a satisfaction for money, nor money for land" (4).

Constructive ademption.

This kind of ademption or satisfaction of a legacy is termed *constructive* (5).

§ 2. "**Ademption**" & "**Satisfaction**."—The difference between Ademption and Satisfaction lies in this :—"In Ademption the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequent to the will, he may either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case, the law uses the word *ademption*, because the bequest or devise contained in the will is thereby adeemed, that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the same objects, and he either states, or the law raises the presumption, that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will." That is to say, in case of *satisfaction*, the portion which the testator has covenanted to pay can only be satisfied by the bequest with the consent of the objects of the covenant; whereas, in case of *ademption* the gift by will is revocable and the testator may substitute for it any form of gift he pleases. Again, in the former case the question whether the gift by will was intended to be a satisfaction of the covenant is a question of testamentary intention; in the latter the question is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself [see *Lord Chichester v. Coventry*, L. R. 2 H. L. 71, 90] (6).

See Law Commissioners' Report, last para, sec. 164 (S), *ante*.

§ 3. **Application of the rule to Hindu Wills.**—The *prima facie* presumption against double portions, or two-fold benefits noticed above (§ 1 *supra*)

(1) Wms. 1338-39; Flood. 51-52; 2 W. & T. L. C. 338; Bigelow 370.

(2) Wms. 1338-39; Flood. 52; 2 W. & T. L. C. 338; Bigelow 370.

(3) See secs. 57 (S) & 90 (S) § 6, *ante*.

(4) Wms. 1341; Flood 52.

(5) Flood. 52.

(6) 2 W. and T. L. C. 373.

may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions or instruments [*Lord Chichester v. Coventry*, *supra*; *Weall v. Rice*, 2 Russ and M. 251). This rule which is founded chiefly on the *dictum* of Sir John Leach in *Weall v. Rice* (*supra*), has been applied to the case of a Hindu will in *Jugjivandas v. Brijdas* (7 Bom. L. R. 299). In that case, the testator, a partner, in the firm of Jugjivan Himraj made a will in which, after referring to several gifts which he had made in his lifetime out of a certain sum, directed that his property consisting of * * * * * “should be administered by his executors in accordance with certain provisions of the will”. Among those provisions was a bequest in favour of his son’s daughter, Bai Nathi, then a minor. This was to the following effect :—For Bai Nathi * * * * Rs. 2,000 out of my property are to be set apart on the condition that * * * *.” On the very next day the testator had a credit entry of Rs. 2,000 made in Bai Nathi’s name in the books of the said firm of Jugjivan Hemraj. The entry ran as follows : “Credited to the account of Bai Nathi Rs. 2000 in cash. Credited to your account and debited to the account of Bai Karam Chand Velji (the testator).” The question being, whether the credit entry was the same as that mentioned in the provision of the will ; or which is the same thing, whether there were double gifts or “double portions” as such gifts are called, and if so, whether they are valid, it was held, that the two gifts were different, and the credit entry had nothing to do with the provisions of the will. In delivering the judgment of the Court. Mr. Justice Chandavarkar said : “The question is one of the testator’s intention and though the will here is governed by Hindu Law, the principles of English Law as applied to what are called “double portions” may well be borne in mind as principles of equity, justice and good conscience, in ascertaining that intention from the terms of the will, the terms of the credit entry, and the surrounding circumstances.” His Lordship then referring to a passage in Lord Cranworth’s judgment in *Lord Chechester v. Coventry* (*supra*), quoted with approval the following *dictum* of Sir John Leach in *Weall v. Price* (*supra*), as affording “a guide to the determination of the question I have now to decide” :—

“Where the two provisions are of the same nature or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where provisions are of a different nature the two instruments afford intrinsic evidence in favour of a double provision” [*Jugjivan Das v. Brijdas*, *supra*].

The Hindu Wills Act.

[PART XXVII, ACT X, 1865.]

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OF ELECTION.

108. [167-(S)].—Where a man, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and in the latter case he shall give up any benefits which may have been provided for him by the will.

Circumstances in which election takes place.

See exception, sec. 172 (S), infra.

NOTES AND COMMENTARIES.

1. *The section.*
2. *Preliminary.*
3. *"By his will."*

- § 4. *"He shall give up any benefits."*
§ 5. *Finality of election.*
§ 6. *Estoppel by election.*
§ 7. *The doctrine applied to Indian cases.*
§ 8. *The doctrine applied to appointments under power.*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Wills of Hindus, Jainas, Sikhs and Buddhists. It is also applicable to the wills of Parsees.

§ 1. The section.—This section and section 168 (S), correspond to the 1st rule in section 35 of the Transfer of Property Act (Act IV, 1882). That rule is to the following effect :—

Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

§ 2. Preliminary.—It is a principle of Equity, that a person, who accepts a benefit under an instrument, must accept it whole, whether favourable or unfavourable, giving full effect to all its provisions, and must at the same time renounce all rights inconsistent with it. If, therefore, a testator affect to dispose of property which is not his own, at the same time giving a benefit to the one to whom that property belongs, the devisee or legatee, shall not be permitted to keep his own property and enjoy the fruits of the devise or bequest, but he must elect whether he will part with his own estate and accept the benefit conferred on him, or continue to enjoy his own property, and reject that benefit. This is what is called the “doctrine

Doctrine of election. of election.” It rests on “the rational exposition of the will, that where a testator devises what he has no power over, upon a supposition that his Will will be acquiesced in, the Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it; there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor has made” [see *Stratfield v. Stratfield*, Ca. Temp. Talbot. 176; *Birmingham v. Kirwan*, 2 Sch. and Lefr. 449; *Rogers v. Jones*, L. R. 3 Ch. D. 668; *Syme v. Badger*, 92 N. C. 706; *Caulfield v. Sullivan*, 85 N. Y. 153; *Havens v. Sackett*, 15 N. Y. 365; and also *Forbes v. Amereoonnissa Begum*, 10 Moo. I. A. 340; *Mangaldàs v. Ranchhoddas Bhavánidàs*, I. L. R. 14 B., 438] (1).

‘**Election,**’ may accordingly be defined to be the “obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party, who has a right to control one or both, that one should be a substitute for the other. The party who is to take, has a choice; but he cannot enjoy the benefits of the both” (2). Or, in other words, ‘*election*’ is an equitable arrangement by which “full effect is given to a donation of that which is not the property of the donor” (3). (a)

(a) “A disposition calling for an application of the doctrine of election may be made under two following different states of circumstances: Either the donor may know that the property he assumes to deal with is not his own, but belongs to another, and notwithstanding such knowledge he may assume to give it away; or he may give it away, not knowing that it belongs to another, but erroneously and in good faith supposing that it is his own. In the first of these two cases, the presumption of an intention on the part of the donor to annex a condition to the gift calling for an election by the beneficiary plainly agrees with the actual fact, at all events it violates no probabilities. When a testator devises an estate belonging to A to some third person, and at the same time bestows a portion of his own property upon A, he undoubtedly must rely upon the benefits thus conferred upon A as an inducement to a ratification by A of the whole disposition. To give A the property which the testator was able to dispose of, and at the same time to allow him to claim his own estate, which had been devised to the third person, by his own paramount title, would be to frustrate the evident intention of the testator. In the second case, where the testator, or

(1) 2 W. and T. L. C. 369; Story. Eq. Jur. § 1077; Bigelow. 343 Wms. 1447; Jarm. 443; 4th Edn.; Theob. 91, 5th Edn.

(2) Story. Eq. Jur. § 1075.

(3) Story. Eq. Jur. § 1077.

Election is either express and positive, or implied or constructive. If a testator should bequeath an absolute legacy of Rs. 10,000, or a life annuity of Rs. 1,000 per annum, at the legatee's election, this will be a case of express and positive election. So, if the testator bequeaths one of his horses, or a horse, and if there be more than one, the legatee will have the election, which horse he will have. This is also a case of express election. But if the testator should devise an estate belonging to his brother, to a third person, and at the same time bequeath to him (brother) a sum of Rs. 10,000, the election will be implied or constructive (1). It is, therefore, clear that this section deals with the latter kind of election, i. e., implied or constructive election.

Now, since a devise or bequest of that which is not the property of the testator, is void at law, the question may naturally suggest itself, on what ground

other donor, erroneously supposes that the property which he undertakes to give away is in fact his own, the doctrine of election applies with the same force and to the same extent as in the former. Here it is in the nature of things simply impossible that the donor could actually have had the *intention* which the theory imputes to him, since he really believes himself to have a disposing power of the property or to be dealing with property which is his own. And yet the earlier decisions, at least, regarded the presumed intention to annex a condition to the gift as the true foundation of the doctrine in this case as much as in the other. The course of reasoning through which the judicial mind passed in reaching these conclusions is very plain, and, as I think, very natural. In an early case of the first kind, where a testator had designedly assumed to devise property over which he knew that he had no disposing power, the Courts saw and were compelled to see an actual intention of the testator to annex the tacit condition to his gift, and this intention was made the basis of the doctrine of election as applied under such circumstances. When another case arose of the second kind, where the testator had acted under an erroneous supposition, the Court, having concluded that the doctrine of election must also be applied here, naturally, and, as a part of their verbal judicial logic, gave to it the same foundation in an assumed intention of the testator, although under the circumstances, no such intention actually existed or could exist. The doctrine, therefore, although originally springing from an actual intention, and although professing always to be based upon the intention, is really independent of intention; while the language may still be repeated that the Court *presumes* an intention no evidence would ever be admitted for the purpose of showing its existence or non-existence. In short the doctrine of election has become a positive rule of the law governing the devolution and transmission of property by instruments, of donation, and is invoked wholly irrespective of the intention of the donor, although in the vast majority of cases it undoubtedly does carry into effect the donor's real purpose and design."

"What then, is the real foundation?" It is possible to answer this question. There is, in my opinion, a true *rationale* which at once relieves the doctrine of election from all the semblance of technicality and untruth attaching to it when it is referred to a presumed intention, which prevents it from being regarded as a stretch of arbitrary power on the part of the Court, and which shows it to be in complete harmony with the highest requirements of righteousness, equity, and good faith. I venture the assertion that the only true basis upon which the doctrine can be rested is * * * * * the grand principle that *he who seeks equity must do equity* * * *. There is no doctrine more unmistakably and completely derived from this grand principle than that of election. The whole theory and process of election is a practical application of the maxim.—'He who seeks equity must do equity.' A party asserts his claim to certain property; in order that he may obtain any relief he must acknowledge and make provision for the equitable rights of other parties derived from the same instrument, and to that end must make his election so that in either choice those rights shall be preserved. The very election which he is obliged to make consists in the "doing equity" to others which the principle demands. In this principle is found a sufficient explanation and a solid foundation for the doctrine which is thus seen to harmonize in all its phases and applications, with the requirements of justice and good faith" (2).

(1) Story, *Eq. Jur.* § 1076; Shep. T. 432, 447.

(2) Pomeroy, § § 464-465, pp. 773-777. Mr. Pomeroy's conclusions are approved in *Barrier v. Kelly* [(Miss), 33 South, 974] and cited in *Penn v. Guggenheimer*, 76 Va. 839, 846.

does the Court uphold such devise or bequest? We have already seen that the doctrine of 'election' is based upon principles of Equity only. The ground upon which the Courts of Equity interfere in such cases, is, "that the purposes of substantial Justice may be obtained by carrying into full effect the whole intentions of the testator. And in regard to cases of implied election, the foundation of the doctrine is still the intention of the author of the instrument; an intention, which, extending to the whole disposition, is frustrated by the failure of any part.....The intention being assumed, the conscience of the donee is affected by the condition (although it is destitute of legal validity), not express, but implied, which is annexed to the benefit proposed to him. For the donee to accept the benefit, while he declines the burden, is to defraud the design of the donor" (1). See F. note (a) p. 542, *supra*.

Suppose A devises to C property belonging to B, by a will, whereby he bequeaths to B, Rs. 10,000. Here, if B elects against the will, that is, if he chooses to hold his own property and renounce the benefit of the bequest made to him, it is clear that the design of the testator will be frustrated, and C, the devisee, will be disappointed, and would be wholly remediless, the devise being void at law. But equity contemplates such a transaction in a different light, and will treat the substituted legacy of Rs. 10,000, "not as an extinguished title, but as a trust in the legatee for the benefit of the disappointed claimant (C), to the amount of his interest therein;" or, "will assume Jurisdiction to sequester the benefit intended for the refractory donee (B), in order to secure compensation to him whom his election disappoints" (2). That is to say, if A devises to C an estate of B worth Rs. 10,000, and by the same instrument gives to B a substituted legacy of Rs. 20,000, and if in such case B refuses to part with his own property, C will have a claim of compensation to the extent of Rs. 10,000, to secure which equity will treat the sum of Rs. 20,000 as a trust in the hands of B, or will sequester the same for that purpose. Or in other words, if B should choose not to surrender his own property, he will be bound to surrender an equivalent value of the benefits given him by the will, to render compensation to the disappointed devisee; and will be entitled to lay a claim to the difference, which in the above case is Rs. 10,000. This is the rule of English law as established by recent decisions [see *Rogers v. Jones*, L. R. 3 Ch. D. 688; *Pickersgill v. Rodger*, L. R. 5 Ch. D. 963] (3). But under this section, B, by refusing to part with his property, forfeits such claim even. See illus. (a), sec. 169 (S), *infra*.

In cases of election, the question of intention is one of utmost importance.

Intention being of utmost importance, how it operates.

In *Warren v. Rudall* (1 J. and H. 1, 10) Sir J. P. Wood, V.-C., says: "There it is a simple question of intention, whether there is sufficient indication of an intention on the part of the testator to dispose of what was not his own property. When the Court discovers that intention, it will not permit a person to take anything under the will unless he will allow the whole of the testator's wishes to be carried into effect." It is, therefore, necessary, for the operation of this doctrine, that, there must be an intention clearly manifested in the will, or, as it is sometimes called, "a demonstration plain, or necessary"

(1) Story. Eq. Jur § 1077.

(2) Story. Eq. Jur. §§ 1082, 1083.

(3) 1 Jarm. 444, 4th Edn.; 416-17, 5th Edn.; Theob. 91, 5th Edn.; T. L. Lect., (1886), 235.

implication" on the part of the testator to dispose of the property which is not his own (*Rancliffe v. Parkins* 6 Dow. 149, 179]. For if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be, that he did not mean them to apply to that over which he had no disposing power (see *Dummer v. Pitcher*, 5 Sim. 35). Thus, "a mere recital in a will, that A is entitled to certain property, but not declaring the intention of the testator to give it to him, would not be a sufficient demonstration of his intention to raise an election" (*Dashwood v. Peyton* 18 Ves. 41) (1).

In order to raise a case of election there must be a *personal* competency on

Personal competency necessary to raise a case of election. the part of the author of the attempted disposition. Such competency and the devise must further refer only to such property as is capable of being given by such a will; as, where a testator domiciled in England, devises "all his real and personal estates, whatsoever and wheresoever," and has Scotch heritable bonds, which do not pass by the will, for want of certain formalities required by the Scotch law; here, the Scotch heir is not put to his election, but may take English property under the will without giving up the bonds (*Allen v. Anderson*, 5 Hare 163; *Maxwell v. Maxwell*, 16 Beav 106) (2).

Hindu widow's inability. With regard to personal competency, it is observable that, the inability of a Hindu widow to devise immoveable property, inherited from her husband, does not arise from personal incapacity to devise, but it is of the same nature as that which precludes every one else from disposing by will of what does not belong to him. [Per Sir Charles Sargent, C. J., in *Mongaldas v. Ramchhoddas Bhavanidas*, I. L. R. 14 B., 438, at 440-41].

Where election not raised. No case of election will arise when it appears that the testator meant only to dispose of the property, provided he had power to do so [*Church v. Kemble*, 5 Sim 525] (3). Nor will any such case be raised, when the testator is found to have been labouring under an erroneous belief, although he might expressly declare that he has made his will on the faith of such belief [*Langston v. Langston* 21 Beav. 552; *Dashwood v. Peyton*, *supra*] (4).

Where the party disputing the validity of a bequest does not claim as his own any property that the testator has disposed of, no question of election arises [*Kamal Kumari Devi v. Narendra Nath Mukherjee* (1907) 9 C. L. J. 19].

Operation of the doctrine. The doctrine of election is applicable to interests immediate, remote, contingent [see illus. (b), and sec. 169 (S), *post*], of value or not of value [*Wilson v. Townshend* 2 Ves. Jun. 697; (5) *Dillon v. Parker* [(1818) 1 Swan. 359, 402, n.]. It is only applicable as between a gift under a will, and a claim *dehors* (foreign to) the will and adverse to it, and not as between one clause in a will and another clause in the same will [*Re Lord Chesham*; *Cavendish v.*

(1) Wms. 1448; 1 Jarm. 452, 4th Edn.; Story. Eq. Jur. § 1089.

(2) Wms. 1450; 1 Jarm. 446, 448, 4th Edn.; 418-20, 5th Edn.

(3) Wms. 1447, F. n.

(4) Theob. 96, 5th Edn.

(5) Theob. 92, 5th Edn.

Dacre, L. R. 31 Ch. D. 466; *Wollaston v. King*, L. R. 8 Eq. Ca. 165] (1). Thus, there is no election where under the same will a legatee takes several legacies, some of which are onerous. In such cases the legatee may reject the onerous without forfeiting the others [*Andrew v. Trinity Hall*, 9 Ves. 525, 533 (2)]. But if the onerous and beneficial legacies are given together as one entire gift, or there is an intention that the legatee shall not take one without the other, he must take all or none [see sec. 110 (S) ante]. Thus in *Talbot v. Earl of Radnor* (3 My. & K. 254), a testator bequeathed a leasehold house to his sister, and he also bequeathed to her an annuity for her life. The rent reserved by the lease was higher than the house would let for at the time of the decease of the testator. The question was, whether, if the legatee disclaimed the lease, she could retain the annuity. It was held by Sir John Leach, M. R., that, as it was the plain intention of the testator that his estate should no longer be subject to the rent of the leasehold house, the legatee could not, in that respect, disappoint his intention, and retain the benefit given by his will; but she must take the benefit *cum onere* (3). But in such cases, the question is one of intention of the testator, whether the legatee will take all or none, or the beneficial only repudiating that which is burdensome [*Warren v. Rudall*, 1 J. & H. 1] (4).

"The difficulty of sustaining a case of election is always much greater where the testator has a partial interest in the property dealt with, than where he purports to devise an estate in which he has no interest at all. For if the testator has some interest, the Court will lean as far as possible, to a construction which would make him deal only with that to which he is entitled." In these cases the question is not simply whether the testator referred to particular property, but whether he intended the bequest to comprise such property *inclusive of the interest* of his co-owner [*Lord Ranelagh v. Lady Parkyns*, 6 Dow. 185; *Henry v. Henry*, L. R. 6 Eq. 286; *Miller v. Thurgood*, 33 Beav. 496; *Padbury v. Clark*, 2 Mac. & G. 298] (5).

Such cases are likely to be of frequent occurrence in this country, and accordingly, it is suggested that this Act leaves unnoticed "a difficult class of cases" (6).

The doctrine of election has been held not to apply to creditors; for, "no case of election arises where the benefit conferred on the owner of the property attempted to be disposed of is the payment of a debt due to him from the transferor," *i. e.*, the testator [*Kidney v. Coussmaker*, 12 Ves. 136] (7). But the release of a debt due to the testator from the legatee, while the testator releases a debt due to the legatee from a third person, will put the legatee to his election [*Synge v. Synge*, L. R. 15 Eq. 389] (8). Nor will the doctrine apply for the purpose of enabling the testator to evade a rule of law founded on public policy, as for instance the rule against perpetuities [*Re Oliver's settlement* (1905) 1 Ch. 191; *Re Wright*, (1906) 2 Ch. 288].

§ 3. "By his will."—That is, upon the face of his will (9). The meaning is, that the testator's *intention* to dispose, which, as it has already appeared,

(1) Wms. 1448; 1 Jarm. 445, 4th Edn.; 417, 422, 5th Edn.; Theob. 95, 5th Edn.

(2) 1 Jarm. 450, 4th Edn.; Hend. 304; Theob. 104, 5th Edn.

(3) Wms. 1454; 1 Jarm. 450, 4th Edn.; Theob. 105, 5th Edn.; Hend. 304.

(4) Wms. 1455; 1 Jarm. 450, 4th Edn.; Theob. 79 3rd, Edn.; 104, 4th Edn.

(5) 1 W. and T. L. C. 382; 1 Jarm. 456, 4th Edn.; Wms. 1448, F. n.

(6) Stokes. 133.

(7) Wms. 1449; 1 Jarm. 451, 4th Edn.; Theob. 81, 3rd Edn.

(8) Hend. T. S. 154, 2nd Edn.; Theob. 97, 5th Edn.

(9) Wms. 1448; Stokes. 129.

is the chief point, must, in all cases, appear by the will alone. In cases which require it, the Court may, however, look at the external circumstances, and consequently receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood [Lord Langdale, in *Clementson v. Gundy*, 1 Kee. 309; *Stratton v. Best*, 1 Ves. Jun. 285] (1).

§ 4. “He shall give up any benefits”—These words settle the question, whether where a legatee elects against the will, such election induces the necessity of relinquishing the benefit given by it in *toto*, or only imposes an obligation to indemnify the claimants whom it disappoints; or which is the something, whether the principle on which the doctrine of election proceeds, is forfeiture or compensation. So the legatee who elects against the will, must under this section, forfeit all benefit under the will. But in England, as already seen, the rule is, that compensation only is to be made (2).

§ 5. **Finality of election.**—Election once made cannot be retracted; it is final, and unalterable [*Scarf v. Jardine*, 7 App. Cas. 360] (3). But a person having elected under a misconception is entitled to make a fresh election [*Kidney v. Coussmaker*, 12 Ves. 136] (4)

§ 6. **Estoppel by election.**—The main object of the doctrine of election as will appear from the above is the protection of the net result of testamentary writings. This being so, where a testator left two testamentary instruments, one dealing with his property in Scotland and the other with his property in Australia, desiring expressly, that the former was to be interpreted according to Scotch law and the latter according to the law of New South Wales, and there were large bequests made to his widow in both the wills, but so far as the Scotch will was concerned the widow elected to take against the will relying upon her right as a Scotch widow, the question was, whether by such election she was estopped from claiming under the Australian will, and it was held that she was estopped.

The rule of law is stated to be that, whether a person leaves one writing or several such writings it is the aggregate or the net result that constitutes the will, or in other words, the expression of his testamentary wishes; so that when the law of approbate and reprobate (*i.e.*, the doctrine of election) is applied, it is this, the net result of the testamentary writings which it is intended to protect from invasion [*Douglas-Menzies v. Umphelley* (1908) A. C. 224 (P. C.)].

§ 7. **The Doctrine applied to Indian cases.**—In *Mangaldas v. Ranchhoddas Bhavniddas* (I. L. R. 14 B., 438), Diválíbai a Hindu widow, died making a will in respect of property which she had inherited from her husband, Tulsidás, who died childless. By her will she left a legacy of Rs. 2,000 to the plaintiff, and the rest of the property to the defendant's father, who was also appointed the executor of her will. The plaintiff and the defendant's father were the sons of the sisters of her husband, Tulsidás. The plaintiff sued to recover the legacy and also half of the property left to the defendant's father. He claimed the legacy under the will and the half share of the property as heir

(1) Wms. 1448; Hayne's L. C. 191.

(2) Wms. 1456.

(3) Hayne's L. C. 192.

(4) Jarm. 471, 4th Edn.

of Tulsidas. It was held that the plaintiff should be put to his election, whether to take the legacy under the will, or half the property as heir of the testator's husband. In delivering the judgment of the Court, Sir Charles Sargent, C. J., said:—"The doctrine of election depends upon an implied condition that the devisee will comply with all the provisions of the will by renouncing the right to his own property" (see *Pramada Dasi v. Lukhi Narain Mitter*, I. L. R. 12 C., 60).

But *ratification* is not *election*. Where a person disposes of property by

Ratification, not election.

will over which he has no power of disposition, the will may be ratified by the person entitled to the property.

In *Purmanundas Jeevundass v. Venayekrao Wassoodeo* (I. L. R. 7 B., 19; I. R. 9 I. A. 86; 12 C. L. R. 92), the will, though invalid for want of testator's power, was held to "turn upon the effect of" other transactions, *e. g.*, acknowledgment agreeing to become a joint trustee for the management of the testator's dedicated *Dharamsala* for *sadhoos* and *saints*.

Where a testator disposed of ornaments describing them as "my own and my wife Motivahu's ornaments, jewels set with stone and pearls, gold and silver," it was held, that no question of election could arise "if there were other ornaments which she wore, and of which the testator had power to dispose," the wife's *stridhan* ornaments not falling within the description (*Rai Mamubdi v. Dossá Morarji*, I. L. R. 15 B., 443, 452).

§ 8. **The doctrine applied to appointment under power.**—The doctrine of election is applicable to cases of appointment under a power. Thus if one having a special power give benefits by will out of his own property to the objects of the power, and appoint the subject of the power to strangers, or to an object of the power charged in favour of strangers, the former will be obliged to elect in favour of the latter [*Whistler v. Webster* 2 Jun. 1m. 367; *White v. White* 22 Ch. D. 555; *Re Wheatley* 27 Ch. D. 606]. But the doctrine does not apply if the testator shows that he is aware that the appointment is of doubtful validity (1).

109. [168 (S)].—The interest so relinquished shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.

Devolution of interest relinquished by the owner.

See exception, sec. 172 (S), infra.

The compensation, which has to be made by a person electing to take against the will, is a charge upon the benefits he receives under the will (see *Pickersgill v. Rodgers*, L. R. 5 Ch. D. 163) (2).

See illus. (a), next section, and sec. 167 (S), § 1, *supra*.

(1) Jarm. 850 6th Edn.; Farwell 307, 1st Edn.

(2) 1 Jarm. 444, 4th Edn.; Theob. 78, 3rd Edn.; 95, 5th Edn.

110. [169 (S).]—This rule will apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Testator's belief as to his ownership immaterial.

See exception, sec. 172 (S), infra.

Illustrations.

(a) The farm of Sultanpore was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpore, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(b) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue leaving at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel, nor to lose the estate.

(c) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married, and has children) shall leave no issue living at his death. B must elect to give up the estate, or to lose the legacy.

(d) A. a person of the age of 18 domiciled in British India, but owning real property in England, to which C is heir-at-law, bequeaths a legacy to C, and, subject thereto, devises and bequeaths to B "all his property, whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *"Does or does not believe."*

§ 3. *Illustrations.*

Extent of the Section.

This section is applicable to the Wills of Hindus, Jains, &c. and also to those of Parsis.

§ 1. **The section.**—This corresponds to the 2nd rule in section 35 of the Transfer of Property Act. That rule is based upon this section and is almost a verbatim reprint of it. It runs as follows:—

"The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own."

§ 2. **"Does or does not believe."**—It is immaterial for the operation of the principle of election, whether the testator disposes of property which does not belong to him, knowing it not to be his own, or whether he does so under the erroneous belief that it is his own. It will be sufficient if it is clear that the testator intended to dispose of the property of the devisee or legatee, *i. e.*, property belonging to the person whom it is attempted to put to his election, and did not intend to dispose of any interest of his own in such property; although, if the property was erroneously supposed to be his own, that would not affect the case; for the Court would not speculate upon what the testator would have done if he had known the true title [*Whistler v.*

Webster, 2 Ves. Jr. 370; *Cooper v. Cooper*, L. R. 6 Ch. D. 15; *Havens v. Sackett*, 15 N. Y. 365]” (1).

Thus it is not necessary to prove that the testator was aware that the property was not his own [*Coutts v. Ackworth*, L. R. 9 Eq. 519] (2).

§ 3. **Illustrations.**—Illustrations (b) and (c) show that the doctrine is applicable to contingent interests.

In Illustration (d), the real property does not pass by the will, because the testator A, by the law of England being an infant is legally incompetent to make a will, and succession to immoveable property is governed by the *lex loci rei sitæ* (see *Hearle v. Greenbank*, 3 Atk. 695, 715; *Carry v. Askew*, 1 Cox. 241; also see *Mangaldás v. Ranchhoddás Bhávanidás*, I. L. R. 14 B., 438, at 440, where these cases have been noticed] (3).

Bequest for a man's benefit how regarded for the purpose of election.

111. [170 (S)].—A bequest for a man's benefit is, for the purpose of election, the same thing as a bequest made to himself.

See exception. sec. 172 (S), infra.

Illustration.

The farm of Sultanpore Khurd being the property of B, A bequeathed it to C; and bequeathed another farm called Sultanpore Buzrung to his own executors with a direction that it should be sold, and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultanpore Khurd in opposition to it.

A person deriving a benefit indirectly not put to his election.

112. [171 (S)].—A person taking no benefit directly under the will, but deriving a benefit under it indirectly, is not put to his election.

See exception. next section.

Illustration.

The lands of Sultanpore are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultanpore to B, and 1,000 rupees to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to B for the rents of the lands of Sultanpore which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultanpore in opposition to the will.

(1) 1 Jarm. 445, 4th Edn.; Wms. 1447; Story. Eq. Jur. § 1093; Bigelow 346.

(2) Bro. and Shep. Act IV, 91, 2nd Edn.

(3) Wms. 1449; 1 Jarm. 446, 4th Edn.; Theob. 100, 5th Edn.

NOTES AND COMMENTARIES.

Extent of the section.

This section and the last two proceeding sections are applicable to the Wills of Hindus, &c. and of the Parsis.

§ 1. The section.—This section corresponds to the 3rd rule in section 35 of the Transfer of Property Act (Act IV of 1882). That rule is laid down in the following words :—

“A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.”

§ 2. The rule further illustrated.—The rule may be further illustrated by the case of *Lady Cavan v. Pulteny*, (2 Ves. Jun. 544). In that case a lady elected to take a certain estate under a will which purported to dispose of her property and that of her husband; and it was held that the benefit which the husband consequently took as tenant by the courtesy did not raise a case for his election. Here the benefit taken by the husband was clearly both indirect and derivative. In such cases the person who derives the indirect interest does so by reason of an incident to the property belonging to the person through whom it is derived, and it is thus not a benefit conferred by the person professing to transfer property which he has no right to transfer on the owner of such property within the meaning of section 167 (S) *ante* (1). Hence the doctrine of election “does not preclude a party claiming by the will from enjoying a derivative interest, to which he is entitled at law under a legal estate taken in opposition to the will” (2).

A person taking under a will in his individual capacity may in another character elect to take in opposition to it.

113. [172 (S)].—A person who in his individual capacity takes a benefit under the will, may in another character elect to take in opposition to the will.

Illustration.

The estate of Sultanpore is settled upon A for life, and after his death upon B. A leaves the estate of Sultanpore to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpore in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim this legacy of 1,000 rupees under the will.

(1) Wms. 1448-49; 1 Jarm. 444, 4th Edn.; Bro. and Shep. Act IV, 91, 2nd Edn.; Theob. 92, 5th Edn.; Bigelow 347.

(2) Wms. 1449.

Exception to the six last rules.—Where a particular gift is expressed in the will to be in lieu of something belonging to the

Exception. legatee, which is also in terms disposed of by the will; if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under A's marriage settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpore during her life.

A by his will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interest in the estate of Sultanpore, which estate he bequeaths to his son. He also gives his will legacy of 1,000*l.* The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000*l.*

NOTES AND COMMENTARIES.

§ 1. The section.—This is the 4th rule in section 35 of the Transfer of Property Act (IV of 1882), with slight verbal alterations only. That rule is worded thus:—"A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom."

Messrs. Shephard and Brown say:—"Of course trustees, administrators, &c., may elect in one way for their beneficiaries, &c., and in another for themselves. Strictly speaking, however, they do not as a rule take any benefit when acting as such trustees, &c., and this paragraph (section) was probably inserted for the purpose of removing all doubts as to the applicability of the rule in *Lady Cavan's case*" [see sec. 171 (S) § 2] (1).

§ 2. Further illustration.—Where a testator bequeathed all his property to his nephew, in which he included the share of his brother's widow in the ancestral property, and at the same time made a suitable provision for her maintenance and worship, and the widow having at first sued for and obtained the allowance allotted to her under the will, afterwards brought a suit for a share in the ancestral property, it was held that having regard to the doctrine of election, the widow was precluded from bringing such a suit, she having previously made her election by enforcing her claim for maintenance [*Pramada Dasi v. Lakhi Narain Mitter*, I. L. R. 12 C., 60].

114. [173 (S)].—Acceptance of a benefit given by the will constitutes an election by the legatee to take under the will, if he has knowledge of his right to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

When acceptance of a benefit given by a will constitutes an election to take under the will.

Illustrations.

(a) A is owner of an estate called Sultanpore Khurd, and has a life-interest in another estate called Sultanpore Buzrung to which, upon his death, his son B will be absolutely entitled. The will of A gives the estate of Sultanpore Khurd to B, and the estate of Sultanpore Buzrung to C. B, in ignorance of his own right to the estate of Sultanpore Buzrung, allows C to take possession of it, and enters into possession of the estate of Sultanpore Khurd. B has not confirmed the bequest of Sultanpore Buzrung to C.

(b) B, the eldest son of A, is the possessor of an estate called Sultanpore. A bequeaths Sultanpore to C, and to B the residue of A's property. B having been informed by A's executors that the residue will amount to 5,000 rupees, allows C to take possession of Sultanpore. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultanpore to C.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. "*Those circumstances which would influence.*"

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. **The section.**—This section is in accordance with the case of *Worthington v. Wiginton* (20 Beav. 67), in which it is laid down that where there is full knowledge election may be presumed from acquiescence (1). It corresponds to the 5th rule in section 35 of the Transfer of Property Act, 1882, which is to the following effect :—

"Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances."

§ 2. "**Those circumstances which would influence.**"—As to the circumstances under which an election may be required to be made, the general rule is, in the words of Mr. Justice Story, "that the party is not bound to make any election until all the circumstances are known, and the state, and condition, and value of the funds are clearly ascertained for until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice" (2). The enquiry, therefore, as to what acts or acquiescence constitute an election, must be conducted according to the circumstances of each case, rather than by any general principle. The questions that generally present themselves for determination are :—"whether the parties acting or acquiescing were aware of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether these inquiries are precluded by time"

(1) Wms. 1455; 1 Jarm. 471, 4th Edn.

(2) Story. Eq. Jur. § 1098.

[*Worthington v. Wiginton*, 20 Beav. 67; *Wake v. Wake*, 1 Ves. Jun. 335; *Cooper v. Cooper*, L. R. 6 Ch. 15; *Fytche v. Fytche*, L. R. 7 Eq. 494; *Whistler v. Webster*, 2 Ves. 371] (1). Positive acts of acceptance, or of renunciation are not, however, indispensable (2).

In England, where there is full knowledge on the part of the legatee, election will be presumed from acquiescence. This section, however, expressly declares that acceptance of a benefit given by the will constitutes an election, if the legatee has knowledge of his right to elect and of certain other circumstances. But the question is, how is the legatee to obtain knowledge of them, *i.e.*, of "those circumstances which would influence a reasonable man in making an election." In England a party bound to elect is entitled first to ascertain the value of the funds and for that purpose may sustain a bill to have all necessary accounts taken (3). Does such a suit lie here? Sir Whitley Stokes says, "Here in the High Courts such a suit may be brought, but in the maffassal, unless perhaps by section 181 of Act VIII of 1859 (*i. e.*, sections 394 and 395 of Act XIV of 1882 corresponding to Or. XXVI, rr. 11 & 12 of the Code of 1908), no provision seems to exist for such a case by the Code of Civil Procedure or otherwise" (4).

In a very recent case it has been held in England that the husband is bound to elect, where the will by his deceased wife confers benefits on him, between those benefits and the property belonging to himself disposed of by the will, even though the property so disposed of belongs to him by acquisition in her right under the law as it stood before the Married Womens Property Act, 1882; provided that the property is one that could validly pass under the will, if, at the date of the will, it was her own [*In re Harris*; *Leacroft v. Harris*, (1909) 2 Ch. 206].

An election under a misconception of the extent of claims on the fund elected, is not conclusive [*Kidney v. Crousmaker*, 12 Ves. 136] (5). See sec. 167 (S) § 5, *ante*.

The following words of Sir Richard Garth, C. J., are in point:—

"It is clear, that she (the plaintiff) must have known that this ancestral property, which was insufficient for her support, was devised to her nephew, for the very purpose of his providing her with a maintenance. In other words, she must have known that this maintenance was provided for her *in lieu of her ancestral property*, and knowing this, she brought a suit in 1873 to enforce her claim for maintenance against the whole of the property devised by Brindaban (the testator) including this ancestral property" [*Pramada Dasi v. Lakhi N. Mitter*, I. L. R. 12 C., 60 at 62].

Where the person who has to elect between two estates is in possession of both, no presumption of election can be drawn from the fact that he continues in possession [*Padbury v. Clark*, 2 Mac. & G. 298; *Spread v. Morgan*, 11 H. L. C. 588] (6).

(1) Wms. 1455; 1 Jarm. 471, 4th Edn.; Story. Eq. Jur. § 1098.

(2) Story. Eq. Jur. § 1097.

(3) Wms. 1455.

(4) Stokes 130.

(5) Wms. 1455; 1 Jarm. 471, 4th Edn.; Story Eq. Jur. § 1098.

(6) Hend. T. S. 158, 2nd Edn.

115. [174 (S)].—Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

Presumption arising from enjoyment by legatee for two years.

NOTES AND COMMENTARIES.

§ 1. *The section*

§ 2. *“Two years.”*

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c.

§ 1. The section.—This is the 6th rule in section 35 of the Transfer of Property Act, 1882; with very slight alterations. That rule is in these words:—“Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.”

§ 2. “Two years.”—“The limitation of this period is novel but likely to be useful” (1). It is a period of *actual* enjoyment of the benefits provided by the will (2).

The presumption is a rebuttable one. When, however, any presumption arises, it would seem to be binding upon those claiming under the person electing [see *Pramada Dasi v. Lakhi Narain Mitter*, 1. L. R. 12 C., 60].

It would also appear that, in case either of the subject-matters of election is reversionary, the period of two years will not begin to run before both fall into possession, as until then they cannot be enjoyed [*Padbury v. Clark*, 2 Mac. and G. 298] (3).

116. [175 (S)].—Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Confirmation of bequest by act of legatee.

Illustration.

A bequeaths to B an estate to which C is entitled. and to C a coal mine. C takes possession of the mine, and exhausts it. He has thereby confirmed the bequest of the estate to B.

(1) Stokes. 130.

(2) Hend. 306.

(3) Stokes. 133 Bro. and Shep. Act. IV, 93, 2nd Edn.

NOTES AND COMMENTARIES

Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the Hindus, Jains, &c

The section.—This section corresponds to the 7th rule in section 35, Act IV, 1882 (Transfer of Property Act) which is expressed in the following terms :—

“Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.”

“The rule here set out may be referred to the general principle of English law that a contract cannot be avoided where it has become impossible for the parties to be placed in the same position as if it had never been made” [*Streetfield v. Streetfield*, Ca. temp. Talbot. 176 ; see *Syud Taleb Hossein v. Shaik Ameer Buksh*, 22 W. R. 529 ; *Muhammad Mohidin v. Ottayil Ummache*, 1 M. H. C. R. 390].

In *Syud Taleb Hossein v. Shaik Ameer Buksh* (*supra*), Mr. Justice Phear said :—

“And he cannot repudiate it when he has allowed that to occur on the footing, or in view, of the contract which renders it impossible that the parties should be put in *statu quo*. He can only avoid the contract, can claim to have the contract reckoned as void and of no force, when the repayment of the consideration on the one hand, and return of the subject matter or other undoing of the contract on the other, will place the parties in their original relative situations as if no contract had ever been entered into.”

117. [176 (S)].—If the legatee shall not, within one year after the death of the testator, signify to the testator’s representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election ; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

When testator’s representatives may call upon legatee to elect.

Effect of non-compliance with their request within a reasonable time.

This section corresponds to the 8th rule in section 35, Act IV, 1882 That rule is thus declared :—

“If he does not, within one year after the date of the transfer, signify to the transferor or his representatives his intention to confirm or to dissent from

the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election ; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer."

In England no time is fixed by law within which an election must be made. But when a time is specially limited, the person, who should elect and fails to do so within that time, is deemed to have elected to take *against* the instrument [*Streutfield v. Streutfield*, Ca. temp. Talbot. 176].

118. [177 (S)].—In case of disability the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority.

Postponement of election in case of disability.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Practice in England.*

Extent of the section.

This section is applicable to the Wills of Hindus Jainas, &c., and also to those of the Parsis.

§ 1. The section.—This section corresponds to the 9th rule in section 35, Act IV, 1882. That rule is as follows :—

"In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority."

§ 2. Practice in England.—The practice in England is, generally to direct an enquiry as to whether it is to the advantage of the infant to elect or disclaim [*Brown v. Brown*, L. R. 2 Eq. 481-86] (1).

(1) Hend. 309; Hayne. L. C. 191.

The Hindu Wills Act.

[PART XXIX, ACT X, 1865].

—o—

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

119. [187 (S)].—No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

Right as executor
or legatee when es-
tablished.

NOTES AND COMMENTARIES.

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| <p>1. <i>The section.</i></p> <p>2. <i>"Right as executor."</i></p> <p>3. <i>"Right as legatee."</i></p> <p>4. <i>Court of competent jurisdiction.</i></p> <p>5. <i>"Probate of the will."</i></p> | <p>§ 6. <i>Application of the section.</i></p> <p>§ 7. <i>Non-compliance with the require-
ment of the section.</i></p> <p>§ 8. <i>"Shall have granted."</i></p> |
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Extent of the section.

This section is incorporated in the Hindu Wills Act and is applicable to the wills of Hindus, Jainas, &c. It is also applicable to those of Parsis.

§ 1. The section.—The law in England is the law which is laid down in this section [see *Haji Mohamed Mitha v. Musaji*].
Object and reasons. *Esaji*, I. L. R. 15, B., 657, at 669 *per* Farran J.]. In England, it is in consequence of the exclusive jurisdiction of the Court of Probate (formerly the Ecclesiastical Courts) that an executor cannot assert or rely on his rights in any other Court without showing that he has previously established such right in that Court (1). Here also, the Probate Courts being vested with exclusive jurisdiction in matters testamentary [sec. 51 (P), *post*], the same result follows, that is, ordinarily probate or letters of administration with the will annexed is the only evidence of the executor, administrator or legatee's rights [sec. 12 (P), *post*; *Brojanath Dey Sirkar v. Anandamayi Dasi*, 8 B. L. R. 208]; so that, a man claiming property as executor or legatee must always be clothed with his representative character by means of such probate or letters (2). See Or. VII, r. 4, Code of Civil Procedure.

(1) Wms. 297.

(2) Walker and Elg. 98, 99.

All the sections of the Indian Succession Act relating to grants of probate and letters of administration which had formerly been incorporated in this Act, have been removed from it and re-enacted *verbatim* in Act V of 1881, with the exception of this section only. Consequently, this section is still a section of this Act (*i.e.*, the Hindu Wills Act) by reference, having, of course, no corresponding section in the Probate and Administration Act (see sec. 154, Act V of 1881). This being so, probate, according to this section, is necessary in all cases of such Hindu Wills as fall within this Act [see sec. II, *ante*].

In reference to the above mentioned inclusion and exclusion of this section, Sir Charles Sargent, C. J. observes: "It is impossible to suppose that this exclusion of section 187 from the Act of 1881 could have been done inadvertently. On the contrary it bears, from the very manner in which it was done, all the marks of having been done advisedly and of intention. The effect is to bring all Hindus, Mahomedans and other persons exempted from the operation of the Indian Succession Act by section 332 of that Act, immediately or as soon as the local Government with the assent of the Governor-General-in-Council may think fit, to all the provisions of that Act relating to grant of probate and letters of administration, *excepting* section 187, which, however, remains in force in those cases to which the Hindu Wills Act of 1870 was made applicable." The result is, that except in cases falling under the Hindu Wills Act, an executor of any Hindu or Mahomedan Will may establish his right in a Court of Justice without taking out probate [*Sheik Moosa v. Sheik Essa*, I. L. R. 8 B., 241].

The exclusion above referred to seems to be intended to draw a distinction between Hindus and Mahomedans, which is explainable by the fact that a Mahomedan dies intestate as regards the bulk of his properties (the bequeathable share being only one-third), whereas a Hindu can dispose of, at least in Bengal, the largest area within the operation of this Act, his whole property without any restriction. The reason assigned by the Legislature for allowing the Mahomedans an option in matters of probate and letters (by this exclusion) was that to insist on probate or letters as essential would "tend to impose upon a multitude of poor and ignorant people, in cases where there is no difficulty or dispute, an unnecessary amount of trouble and expense" (Statement of object and reasons).

§ 2. "Right as executor."—The right of an executor is of a representative character [see sec. 4 (P), *post*], and is perfected by the grant of probate. In all suits concerning property vested in an executor, when the contention is between the persons, beneficially interested and a third person, the executor so far represents the persons so interested that ordinarily it is not necessary to make them parties to the suit [see cr. XXXI s. 1, C. P. Code, Act V of 1908]. But by virtue of this section in the absence of probate or letters, the suit will be dismissed [*Mun Mohun Ghoshal v. Puresh Nath Roy*, 22 W. R. 174].

§ 3. "Right as legatee."—A legatee may propound a will for proof in solemn form, where the executor fails. He may also, if his legacy has been omitted in the probate, put an executor or other person interested under a will on proof of that will in solemn form (1).

A legatee may sue for his legacy and for accounts [*Cursetjee Pestonjee v. Dadabhai Eduljee*, I. L. R. 19 M. 425]. Such a suit against an executor must proceed, either in the form of an administration suit [*In re Ram Chand Munshi*; *Bidhatree Dassi v. Mutty Lall Ghose*, I. L. R. 21 C., 832], or otherwise [*Purshottam v. Kala Govindji*, I. L. R. 26 B., 301], according to circumstances.

It is only where an executor fails to propound the will, that the legatee may himself propound it. Otherwise, if the will is once proved and probate or letters granted, it is not necessary under this section, that every legatee claiming under the will should separately apply for probate and prove the will [*Chandra Kishore Ray v. Prasanna Kumari Dasi*, 10 C. W. N. 864; 4 C. L. J. 523].

Where a beneficiary entitled under a secret trust [see, *supra*, sec. 127 (S)], claims through the legatee named in the will, this section applies, and he cannot maintain the suit without any grant [*Lonis Kunha v. Sousa*, I. L. R. 31 M., 187, at 204; 18 Mad. L. J. 153, at 176].

A legatee is not bound to assert his title under the will till it has been probated, and the omission of such assertion cannot prejudicially affect him [*Akhil Sundari Dasi v. Nanihala Dasi* (1910) 12 C. L. J. 486; see *Udit Chobey v. Radhica Prasad* (1907) 6 C. L. J. 662].

§ 4. "Court of competent jurisdiction."—As regards the Administrator General of any of the Presidencies of Bengal, Madras and Bombay, the High Court at the Presidency town shall be deemed to be a Court of competent jurisdiction within the meaning of this section [see sec. 14, Act II of 1874 corresponding to sec. 6 Act III 1913 (Administrator General's Act, 1913)].

As to what Courts are ordinarily competent to grant probate or letters of administration, see secs. 51 (P), 52 (P) and 87 (P), *post*. See also Chapter I, Probate and Administration Act, 1881.

§ 5. "Probate of the will."—The word 'probate' in this section, has been held to mean the copy of a will certified under the seal of a Court of competent jurisdiction with the grant of administration to the estate of the deceased (1) [*per* Messrs. Justices Pontifex and R. C. Mitter, in *Mun Mohun Ghosal v. Puresh Nath Roy*, 22 W. R. 174]. This section is not to be interpreted by construing it with section 181 of the Succession Act or 6 (P) *post*, according to which probate can be granted only to an executor, but is to be interpreted with referenceto the general scope and intention of the Act. Thus the word "probate" includes letters of administration, and it may be granted to a legatee [*Mun Mohun Ghosal v. Puresh Nath Roy*, *supra*], or a residuary legatee [*Gordhandas v. Bai Ramcoover*, I. L. R. 26 B., 267]. The result is, that, notwithstanding the terms of section 6 (P) *post* [or sec. 181 *supra*], the grant of administration with the will annexed which a residuary legatee may obtain under section 19 (P) *post*, will satisfy the requirements of this section, entitling the grantee to establish his claim [*Gordhandas v. Bai Ramcoover*, *supra*; *Chandra Kisore Ray v. Prasana Kumari Dasi* (1910) 15 C. W. N. 121, P. C.; 13 C. L. J. 38; 21 M. L. J. 116; 38 C., 327].

'Probate' includes letters of administration.'

§ 6. Application of the section.—Although in cases not falling under this Act, an executor is not bound to obtain probate [*Bhagban Sang v. Becharadas*, I. L. R. 6 B., 73; *Krishna Kinkur Roy v. Panchuram Mundul*, I. L. R. 17

(1) This is exactly what the Act defines. See definitions, *ante*.

C., 272; *Ibid v. Rai Mohun Roy*, I. L. R. 14 C., 37] it seems, that in cases falling under Act VII. of 1889 (The Succession Certificate Act), debtors have a right (under section 4 of that Act) of insisting upon a plaintiff-executor taking out probate [see *Sheik Moosa v. Sheik Essa*, I. L. R. 8 B., 241]. But this cannot be supposed to lead to the conclusion, that an application for a certificate is to be rejected because the applicant might have applied for probate [*Kalidās Fakir Chand v. Bai Mahali*, I. L. R. 16 B., 712].

This section applies not only where the executor or legatee seeks to establish his right in any Court of Justice, as such executor or legatee, but also where he claims to assert or rely on his right in any Court in his capacity as such, or wants to transfer any property as such executor or legatee (1). It also applies to the case of a person claiming under the executor or legatee [see *Haji Mahomed Mitha v. Musaji Esaji*, I. L. R. 15 B., 657].

Probate is necessary in support of legal title where beneficial interest passes by survivorship. See sec. 4 (1) *post*.

Where it does not apply. This section does not apply, *i. e.*, probate is not required, in the following cases:—

(a) Where certificate of guardianship is applied for [*Pathan Ali Khan v. Bai Panibai*, I. L. R. 19 B., 832].

(b) Where the will was made before the Hindu Wills Act came into operation, *i. e.*, before 1st. September, 1870 [*Krishna Kinkur Roy v. Rai Mohan Roy* I. L. R. 14 C., 37; *Krishna Kinkur Roy v. Panchu Ram Mandal*, I. L. R. 17 C. 272].

(c) Where the will is made beyond the province in which this Act is in force [*Kanhaiya Lal v. Munni*, I. L. R. 18 A., 260].

(d) Where the question turns upon the existence or otherwise of an authority to adopt, this section does not apply, and an unprobated will may be received in evidence [see *Venkantanarayana Pillai v. Subbamal*, 6 Mad. L. T. 116].

(e) Where the assets do not exceed Rs. 1000, probate may be dispensed with and certificate under sec. 36 (corresponding to sec. 31 of the Administrator General's Act, 1913) of the Administrator General's Act (11 of 1874) obtained [*Narayan Sridhar v. Pandurang Bapuji* (1910) 34 B., 506; 12 Bom. L. R. 471].

§ 7. Non-compliance with the requirements of the section—effect of.—By the terms of this section an executor is, as a matter of course, precluded from establishing his right as an executor in any Court of Justice unless he takes out probate of his testator's will. But the question is, is the will in such a case to be ignored for all purposes? If this question be answered in the affirmative, the result will be that, a creditor's just claims might be defeated by the debtor adopting the simple expedient of refusing to apply for probate until the debt is become barred. It has therefore, been ruled that, though an executor can establish no right without taking probate, the existence of the will cannot be ignored for all purposes; that is to

(1) See Wms. 297.

Where will may be proved otherwise than by probate.

say, under certain circumstances the execution of a will may be proved by means other than the probate [see *Janaki v. Dhanulal*, I. L. R. 14 M., 454; *Prosunno Chunder Bhattacharjee v. Kristo Chaytunno Pal*, I. L. R. 4 C., 342; *Surbomungola Dabee v. Mohendro Nath Nath*, *ibid* 508]. So, it has been held that a defendant is not debarred by this section from relying on a will in respect of which no probate or letters have been taken out, as he is not seeking to establish a right as executor or legatee [*Caratapthi Chunna Cunniah v. Cata Nammalwariah* (1909) 33 M. 91; See *Janaki v. Dhanu Lall*, (1891) *supra*]. In *Surbomungola Dabee's* case (*supra*), the defendant objected that the plaintiff was not entitled to sue because he had not taken out probate. But the Calcutta High Court did not enter into the decision of this question, but allowed evidence of the execution of the will to be given in Court. So, where, of two wills the earlier was not proved but the later was proved, and there was a suit for a declaration that the adoption made on the authority conferred by the earlier will was invalid, it was held that, that will though not proved, was admissible in evidence [*Venkāntanarayana v. Subbamenal* (1912) 22 Mad. L. J. 395].

Unproved will, evidentiary value of.

Does the validity of sale by the executor or legatee depend upon his (or her) taking out probate? Or, which is the same thing, is such a sale to be set aside because the will was not probated? According to the view of Mr. Justice Geidt, expressed in *Rup Chandra Sarma v. Ram Chandra Deb.* [11 C. W. N. lxxvi] it seems this question must be answered in the affirmative. But see *infra*, 12 (P) § 8. —“Probate where not conclusive.”

§ 8. “**Shall have granted.**”—The grant of probate or letters of administration may be made before the decree is drawn up. That is to say, an executor or a legatee may institute a suit claiming to have his right as such executor or legatee established in a Court of Justice, before any such grant has been made, provided the grant is made and the probate or letters are filed in that Court before the decree is actually drawn up. [*Gordhandas v. Bai Ram Coover*, I. L. R. 26 B., 449, 464 and 475; *Chandra Kumar Roy v. Prasanna Kumari Dasi* (1910) 15 C. W. N. 121, P. C.; 13 C. L. J. 58; 38 C., 327; 21 M. L. J. 116]. In this respect, therefore, a Probate or Letters and a Succession Certificate under Act VII of 1889, stand on the same footing [see *Ballav Sen v. Hafiz Mahomed Ali Khan*, I. L. R. 13 C., 47].

§ 9. **Position of executor under non-probated will.**—From the fact that it is not obligatory upon a Mahomedan to take out probate, it does not follow that a Mahomedan executor who has probated his testator's will, is in the same position as one who has not; for, as held by Pugh, J. [in *Sakina Bibee v. Mohamad Ishak*, 37 C., 839; 15 C. W. N. 185] “the consequences provided in case of the Probate and Administration Act as following upon a grant of probate do not and cannot apply where there is no probate.” So that the position of a non-probated will must be as it was before the Indian Succession Act; or in other words, the position of an executor who does not take out probate is the same as that of one before that Act was passed [*Sakina Bibee v. Mohamad Ishak*, *supra*]. For the same reason, the position of a Hindu executor who is not bound to take out probate, must be governed by the rules which prevailed before the Succession Act (see judgement of Pugh, J., in the above mentioned case).

BOOK III.

—:O:—

THE PROBATE AND ADMINISTRATION ACT.

ACT V OF 1881. (a)

—:O:—

*RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 21st JANUARY, 1881.*

*An Act to provide for the grant of Probate of Wills and
Letters of Administration to the estates of certain
deceased persons.*

Whereas it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply; It is hereby enacted as follows :—

Preamble.

Preamble.—See *ante*, p. 9.

CHAPTER I.

PRELIMINARY.

1 (P). This Act may be called the Probate and Administration Act, 1881 :

Short title.

(a) 1. **The Probate and Administration Act.**—When Act XXI of 1870 (The Hindu Wills Act) was passed, those sections of the Indian Succession Act which now constitute the main body of the Probate and Administration Act [sections 179 to 189 (both inclusive), 191 to 199 (both inclusive), so much of Parts XXX and XXXI as relate to grants of probate and letters of administration with the will annexed, and Parts XXXIII to XL (both inclusive), so far as they relate to an executor and an administrator with the will annexed], were incorporated in it by reference. Subsequently, it being held expedient to enact the Probate and Administration Act, all these sections were repealed as constituting portion of Act XXI (Hindu Wills Act) and were embodied in Act V of 1881, the Probate and Administration Act (see section 54 Probate and Administration Act), with the exception of section 187 only (of Act X, 1865) which was allowed to remain embodied in Act XXI, the Hindu Wills Act. That is to say, all the sections of the Indian Succession Act, from section 179 to section 328 (both inclusive), except section 187, being excluded from the Hindu Wills Act, were re-enacted in Act V of 1881, the Probate and Administration Act. So that, sections 179 to 328 which now form the bulk of the last named Act, are still embodied in the Succession Act as an important portion of it, but have nothing to do with the Hindu Wills Act.

The only section which is new in the Probate and Administration Act is section 85 of that Act, which never formed a part of the Succession Act. As already seen all the other sections of the same constituting its main body, have been borrowed from the Succession or the parent Act.

Local extent.

It applies to the whole of British India (b) ;

2. Steps which led to the passing of this Act.—These are shortly the following: "In 1865 the first Act (Act X of 1865) on the law of intestate and testamentary succession was passed, following the lines of English law, but this Act was expressly made inapplicable to the case of the wills of Hindus, Mahomedans and Buddhists (sec. 331, Act X, 1865). In 1870, however, the Legislature felt that it might go further, and, accordingly, it passed the Hindu Wills Act, an Act extending to Hindus, Jains, Sikhs and Buddhists the main provisions of Act X of 1865, but still excepting Mahomedans. In 1881 the Legislature felt it was safe to go further still, and proceeded, accordingly, to remove this last exception, and to enact Act V of 1881, which was made as applicable to Mahomedans as to other classes" (Mr. Justice West in *Fatma v. Shaik Essa*, I. L. R. 7 B., 266, at 270).

3. Reasons for the Act.—Before the passing of the Probate and Administration Act, Hindu Executors, independently of the provisions of the Indian Succession Act, and the Hindu Wills Act, did not, merely in the character of executors take any estate, properly so called, in the property of the deceased. In other words, "the mere nomination of executors, though followed by probate, did not, by itself, confer any estate on Hindu executors further than the estate he might have obtained by the express words of the will, or as heir of the testator" (Mr. Justice Green in *Mānek Lal Atmāram v. Mancheisha*, I. L. R. 1 B., 2). On the other hand, "executors appointed by the particular class of Hindu Wills contemplated by the Hindu Wills Act acquired the same estate and interest in the property of the deceased, together with the same restrictions as to representing the estate in a Court of Justice, as obtained by English law" (Sir Charles Sargent C. J. in *Sheik Moosa v. Sheik Essa*, I. L. R. 8 B., 241, at 253).

In the words of Sir Whitley Stokes, the Honourable Member who introduced the Bill for the Probate and Administration Act, "There is, speaking generally, no means of conferring upon any one a complete and conclusive title as representative of the estate of a deceased Hindu, Mahomedan, or Buddhist, or other person exempt from the operation of the Indian Succession Act. The Hindu Wills Act is at present limited in its operation to the Presidency towns and Lower Bengal; and, even if the proposal to extend it to other parts of British India, now under consideration, is carried out, it will still only apply to cases of testamentary succession among Hindus."

[See Statement of Objects and Reasons, Gazette of India, 1879, Pt. V, p. 763; first Report of the Select Committee, *ibid.*, 1880, Pt. V, p. 35; for discussions in Council, see *ibid.*, 1879, Supplement, pp. 593 and 743; 1880, pp. 515, 556; and *ibid.*, 1881, pp. 10, 47 and 87].

4. Object of the Act.—"The object seems to have been to frame an Act, which would be applicable to all natives of this country, whilst leaving the existing law as to those Hindus to whom the Hindu Wills Act applied, untouched" (*Sheik Moosa v. Sheik Essa*, I. L. R. 8 B., 241, at p. 253-254, *per* Sir Charles Sargent C. J. See also *Krishna Kinkar Roy v. Rai Mohun Roy*, I. L. R. 14 C., 37). It was also the intention of the Legislature that an estate should not be left unrepresented (*Ranjit Singh v. Jagannath Prasad Gupta*, I. L. R. 12 C., 375, at 378).

5. Succession Certificate Act—a supplement to Probate and Administration Act.—The Probate and Administration Act, so far as it is operative in relation to intestate succession, has been supplemented by Act VII of 1889, the Succession Certificate Act—an Act, designed to give security to those who are called upon to pay debts to the representatives of deceased persons in the absence of probate or letters of administration. The grant of probate or letters of administration establishes the general representative character of the grantee, whereas the Succession Certificate Act limits the power of the certificate-holder, as regards the collection of debts and securities of the deceased person, to those debts and securities only which are specified in the certificate. Besides, the representative character of a certificate-holder is not conclusive being liable to be set aside by a regular suit. These limitations and imperfections of a certificate have formed the basis of suggestions to the effect that they may "induce many persons to prefer the more costly, but more effectual letters of administration, and to pay the duty on the whole estate in consideration of the benefits they will derive and the troubles they will avoid" (Speech of the Hon'ble Mr. Evans on the occasion of the passing of the Succession Certificate Act) (1). Thus one of the objects of Act VII of 1889, is evidently to further the end of Act V of 1881—to drive most representatives to take out letters of administration.

(b) This Act has been declared to be in force in Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (13 of 1898), s. 4 (1), and Sch. I, Bur. Code ;

(1) Gazette of India, Part VI, dated March 16th, 1889.

and it shall come into force on the first day of April, 1881.

Commencement.

2 (P). Chapters II to XIII, both inclusive, of this Act shall apply in the case of every Hindu, Muhammadan, Buddhist and person exempted under section 332 of the Indian Succession Act, 1865, dying before, on or after the said first day of April, 1881 :

Personal application.

Provided that nothing herein contained shall be deemed to render invalid any transfer of property duly made before that day :

Provided also that, except in cases to which the Hindu Wills Act, 1870, applies,

and in British Baluchistan by the British Baluchistan Laws Regulation 1890 (I of 1890), s. 3, Bal. Code; and ss. 153 and 154 of the Act have been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation (3 of 1872), s. 3, as amended by the Santhal Parganas Justice and Laws Regulation, 1899 (3 of 1899) Ben. Code

It has been declared under s. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts in the Chutia Nagpur Division, namely :— the Districts of Hazaribagh, Lohardaga and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, (*see* Gazette of India, 1881, Pt. I, p. 504). The District of Lohardaga (now called the Ranchi District, *see* Cal. Gazette, 1899, Pt. I, p. 44) included at this time the Palamau District, which was separated in 1894.

By Notification No. 218 I. J., dated the 4th November 1881 (3), this Act has further been extended to the Hyderabad Assigned Districts, subject to the following modifications.—

(1). In sections 1 and 2 for the word "April" the words "December 1st" shall be substituted.

(2). For the 2nd proviso to section 2 the following proviso shall be substituted.

"Provided also that no Court shall receive applications for probate or letters of administration until the Resident of Hyderabad has, by a notification in the official Gazette, authorized it so to do."

(3). The definition of "Province" in secs. 52 and 59, the provisos, and sections 60, 65, 99, 154 and 155 shall be omitted.

(4). In section 3 in the definition of "Minor," the words and figures "subject to the Indian Majority Act, 1875, who has not attained his majority, within the meaning of that Act, and any other person" shall be omitted.

(5). For the words "British India" and "High Court" wherever they occur, the words "the Hyderabad assigned Districts," and "Resident at Hyderabad" shall respectively be substituted.

(6). In section 5 for the word "province," in section 26 for the words "province in which application for probate is made," in section 28 for the words "province in which application is made," and for the word "province," in sections 29 and 30 for the word "province," in section 39 for the words "province within which the Court that has granted the probate or letters of administration is situate," in section 41 for the word "province," in section 59 for the words "province in which the same is granted," and in section 82 for the words "province in which the same may have been granted," the words "Hyderabad Assigned District," shall be substituted.

no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay and the territories (c) for the time being administered by the Chief Commissioner of British Burma,

and no High Court, in exercise of the concurrent jurisdiction over such local area hereby conferred,

shall receive applications for probate or letters of administration until the Local Government has, with the previous sanction of the Governor General in Council, by a notification in the official Gazette (d) authorized it so to do.

(7). In section 39 for the words "such Court," the words "the Court that has granted the probate or letters of administration," shall be substituted.

(8). In section 52 for the word "it" each time it occurs, the word "he" shall be substituted.

(9). In section 69 for the word "Collector," the words "Deputy Commissioner" shall be substituted.

(10). In section 81 for the words "Local Government" the words "Resident at Hyderabad" shall be substituted.

(11). In section 85 the words and figures, "except in cases to which the Hindu Wills Act, 1870, applies," shall be substituted.

(12). In section 152 the words and figures "or Bombay Regulation No. VIII of 1827" shall be omitted.

(c) For "the territories," etc. read now Lower Burma, [see the Burma Laws Act 1898 (13 of 1868), s. 7, Bur. Code]. The Chief Commissioner is now Lieutenant-Governor of Burma, (see Proclamation, dated 11th April, 1897), Gazette of India, 1897, Pt. I. p. 261.

(d) The following Courts have been authorized to receive applications for probate and letters of administration within the areas mentioned, namely:—

Ajmer-Merwara: the Court of the Chief Commissioner and the Court of the Commissioner, (see Gazette of India, 1889, Pt. II, p. 534);

The Andaman and Nicobar Islands: the Court of the Deputy Superintendent and the Court of the Chief Commissioner, (see Gazette of India, 1881, Pt. I, p. 214);

Assam: the High Court at Calcutta, throughout Assam; all District Judges, as defined in the Act, within the Province; and such Judicial Officers as the High Court may from time to time appoint as District Delegates; (see Assam R. and O., p. 180);

Bengal: the High Court at Calcutta, throughout the territories subject to the Lieutenant-Governor of Bengal (see now the Bengal and Assam Laws Act, 1905, 7 of 1905, E. B. and A. Code as to districts transferred to Eastern Bengal and Assam and as to the Sambalpur district transferred to Bengal); all District Judges, as defined in the Act, within the said territories; and such Judicial Officers as the High Court may from time to time appoint as District Delegates, (see Ben. Stat. R. and O., Vol. II, p. 589);

Bombay: the High Court at Bombay, throughout the territories subject to the Governor in Council; all District Judges as defined in the Act, within the said territories; and such Judicial Officers as the High Court may from time to time appoint as District Delegates, (see Bom R. and O., Vol. I, p. 252);

The Central Provinces: the Judicial Commissioner, throughout the territories under the administration of the Chief Commissioner (see now Act 7, 1905, E. B. & A. Code, as to the Sambalpur district); and every District Court within the Civil District for which it has been established, (see Central Provinces Gazette, 1904, Pt. III, p. 277);

Interpretation
clause.

3 (P). In this Act, unless there be something repugnant in the subject or context,—

“Province”: “Province” includes—see *ante*, p. 13.

“Minor” means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed his age of eighteen years ;

“Minority”: and “minority” means the status of any such person : See *ante* p. 14.

“Will”: “Will”—see *ante* p. 16.

“Codicil”: “Codicil”—see *ante* p. 31.

“Specific legacy”: “Specific legacy” means a legacy of specified property : See *ante* p. 479.

“Demonstrative legacy”: “Demonstrative legacy” means a legacy directed to be paid out of specified property ; See *ante* p. 479.

“Probate”: “Probate”—see *ante* p. 33.

“Executor”: “Executor”—see *ante* p. 33.

“Administrator”: “Administrator”—see *ante* p. 34.

“District Judge.” “District Judge”—see *ante* p. 14.

Coorg ; the Court of the Judicial Commissioner and the Court of the Commissioner (see Coorg District Gazette, 1889, Pt. I, p. 50) ;

Madras : the High Court at Madras, throughout the territories subject to the Governor in Council ; all District Judges, as defined in the Act, within the said territories ; and such Judicial Officers as the High Court may from time to time appoint as Delegates, (see Mad. R. and O., p. 161) ;

The Punjab : the Chief Court, throughout the territories administered by the Lieutenant-Governor of the Punjab ; all District Judges, as defined in the Act, within the said territories ; and such Judicial Officers as the Chief Court may from time to time appoint as District Delegates, (see Punjab Gazette, 1881, Pt. I, p. 483) ; these territories at the time included the North-West Frontier Province ;

The United Provinces ; the High Court at Allaahabad, throughout the territories subject to the Lieutenant-Governor ; the Judicial Commissioner of Oudh, throughout the territories subject to the Chief Commissioner [see now the United Provinces (Designation) Act, 1902, 7 of 1902, Genl. Acts, Vol. V] ; all District Judges, as defined in the Act, within the United Provinces ; and such Judicial Officers as the High Court or the Judicial Commissioner may from time to time appoint as District Delegates, (see U. P. R. and O.) ;

Upper Burma : the Court of the Judicial Commissioner and all District Courts, (see Burma Gazette, 1897, Pt. I, p. 289).

CHAPTER II.

-0:-

OF GRANT OF PROBATE AND LETTERS OF
ADMINISTRATION.

INTRODUCTORY NOTES.

- | | |
|---|---|
| § 1. "Of Grants" and necessity thereof. | § 6. <i>Beebe Muttra's case.</i> |
| § 2. <i>Grants in England.</i> | § 7. <i>Grants in Bombay.</i> |
| § 3. <i>Grants in India.—The Mayor's Courts.</i> | § 8. <i>High Courts established.</i> |
| § 4. <i>The Supreme Courts.</i> | § 9. <i>Grants before Act XXI, 1870, and Act V, 1881.</i> |
| § 5. <i>Power of Supreme Courts to grant probate and letters.</i> | § 10. <i>Different kinds of grant.</i> |

§ 1. "Of Grants" and necessity thereof.—Grants are of probate or of administration. The object of both is the same—administration of the estates of deceased persons. The necessity for grants of administration arises from the progress of a country or people in civilisation and commerce, especially the latter.

Succession is either testamentary or intestate ; so that property devolves either, by the will of the owner or by that of the law, according as such owner died testate or intestate. But it is evident that, neither the one nor the other can be entirely self-executed. With the advancing civilisation and commerce in cities and towns, especially in large cities, people often die away from home and among strangers, leaving large and valuable properties. Necessarily some one must take hold of the matter and see that the rights declared by the will (in case of testacy) or by Statute (in case of intestacy) are carried into effect. The Statute simply declares who the distributees and what their rights are. But that is clearly not sufficient ; there must be some machinery by which the rights so declared can be given effect.

Indeed, estates sometimes are and may be settled without administration, but this course is now-a-days hazardous, if not impossible ; and this can only be done where the claims of all parties, including creditors, can be settled by amicable settlement. But even then owing to the growing complexity of human affairs, a cloud is sometimes left upon the title of the estate and of the parties interested therein, and much trouble and litigation often result. Besides, "the heirs may be numerous ; their interests may differ in degree ; some of them may be minors or otherwise incapacitated ; others may be residing at a distance ; the titles of some may be disputed ; the settlement of claims against the estate may thus be a matter of endless complication ; the making of a satisfactory title to any portion of it which it may be necessary to sell may be impossible" The practical difficulty in the way of settling without administration, is, therefore, the uncertainty which is inherent in the very nature of the case.

Again, where the owner dies testate, and anything has to be done with his will, it is necessary at least to go so far as to get it probated. But who is to get the probate if the executor is abroad and there is no agent or attorney, nor any one willing to take any grant ?

In these circumstances, for the protection of deceased's property and for the enforcement of the rights of all interested parties, some machinery is necessary, and such machinery is supplied by the institution of the practice of

granting administration, which as seen above, is made either by grant of probate or by letters of administration according as the deceased dies leaving a will or not.

The object of such grants is, as indicated above, to invest the grantee with full and complete representative capacity authorising them to deal with the deceased's estates, under the control and supervision of the Courts having jurisdiction, to the entire satisfaction of all concerned. In other words, the object is nothing but to effectually cause the representation of the deceased secured.

§ 2. Grants in England.—In England, the Courts of Common Law had formerly exclusive jurisdiction in all matters connected with wills of real property (e), whilst the Ecclesiastical Courts had the like exclusive jurisdiction over wills of personal property (1). The origin of the jurisdiction of the Ecclesiastical Courts over probates and administrations is buried in obscurity. (f) "At what time, or in what manner the jurisdiction as to personal estate in cases either of testacies or intestacies was originally acquired by the Church does not distinctly appear" (2). It is clear, however, that in the earliest times the right of dealing with the personal estates of persons dying intestate belonged to the King "as the *parens patriæ* and general trustee of the kingdom." This right was from time to time granted by the Crown to different persons, chiefly to the bishops of the different dioceses, or to other Ecclesiastical functionaries, though not rarely it was placed in the hands of lords of manors, and other persons of influence and property, with regard to those dying within the range of their authority. The result was, that in course of time this right came to be vested in a large number of those persons, from which there naturally arose great confusion and considerable abuses. These abuses were remedied, first, by Statute 13 Edw. I. c. 19 (Statute of Westminster), and then by Statute 31 Edw. III. c. 11 which purported to enact that, "instead of the property being distributed by the bishop, he should grant 'administration' of the property before distributed by him, to the nearest relations of the deceased. This led to the appointment of an 'administrator,' who, by the terms of the Statute, was to have the same rights and duties as were possessed by an executor, when the deceased had appointed one" (g) Thus originated 'letters of administration.'

(e) Since the passing of the Land Transfer Act, 1897, (60 and 61 Vict. C. 65) probates and letters of administration in respect to real estate, in case of persons dying after 1897, may be granted by the Probate Division of the High Court under the Judicature Act, 1873. Thus, so far as such grants are concerned, the distinction between real and personal estate has, in a manner, been abolished (See Walker and Elg. 26, 27, 141, 152, 182).

(f) The origin of this Jurisdiction is traceable, according to some authorities, to the old theory by which the personality of a deceased was regarded as being *prima facie* a fund for providing masses for his soul. This is evidenced by the fact that in pre-Reformation wills a bequest for masses was almost invariable, and further, that by Statute 31 Edw. III. c. 4 (1357) the surplus of such property was to be applied for this purpose (3).

(g) Speech of Lord Chancellor Cranworth in the House of Lords calling their attention to the jurisdiction of the Ecclesiastical Courts in testamentary matters (from S. Warren's Law Stud. Vol. II. p. 877). See 2. Bl. 445, 446; 2 Steph. 182-84; Wms 407-410, 8th ed.; 312-314, 10th ed.; Wms. R. P. 209.

(1) Wms. R. P. 209.

(2) Bro. P. P. 1.

(3) J. Wms. 18.

The power of granting probates naturally followed the power of disposition of the intestate's effects which the bishops or the Ordinaries enjoyed; "for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate whose right of distributing his chattels for the good of his soul was effectually superseded thereby." The same bishops, therefore, had the right of requiring that the fact of the existence of a will should be proved to them. Thus they granted letters of probate (*'probatum est,'*—that there is such a will, or, the will is proved).

The bishops of the dioceses who were the judges of the old Ecclesiastical Courts were styled Ordinaries (h), "by way of distinction from their extraordinary or peculiar jurisdiction" (i). The following is a description of the office and duty of an Ordinary:—

Office and duty of 'Ordinary.' "The Office and duty of the ordinary, after the death of any person within his diocese, is, if he hears of any will made, and any executor appointed, to cite the executor, and to compel him to come in and prove the will, and to accept and take upon him the administration of the goods, or to refuse it; and if the executor refuse, or if there be a will made and no executor appointed, the Ordinary must commit the administration *cum testamento annexo* to whom he shall think fit, and take bond of the administrator to perform the will. And if there be no will made, he is to grant the administration of the goods to the next of kin, if he or they require it; and if not, to whomsoever besides shall desire it; or, if nobody seek it he may grant letters to whom he will *ad colligendum bona defuncti* (grant for collection and preservation of property) (2), and thereby take the goods of the deceased into his own hands: and then it seems he is to pay therewith the debts and legacies of the deceased, so far as the same will reach, in such order as the executor or administrator is to pay them" (3). [See *In re Ezekiel Abraham*, I. L. R. 21 B., 139, 144].

Statute 21 Hen. VIII. c. 5., enlarged a little more the power of the Ecclesiastical judge, and permitted him to grant administration either to the widow, or the next of kin, or to both, at his own discretion; and where two or more persons were in the same degree of kindred, it gave the Ordinary his election to accept whichever he pleased. Upon this footing stood the law of wills and administration in England, down to 1857 (4).

By the Court of Probate Act, 1857 [Sta. 20 and 21 Vict. c. 77] amended by that of 1858 [20 and 21 Vict. c. 95], the Court of Ecclesiastical Courts abolished. Probate was created, and the entire testamentary jurisdiction of all Ecclesiastical and other Courts, professing to exercise exclusive Jurisdiction in matters of probate and administration, was "completely and universally throughout England" transferred to this newly

(h) In Ecclesiastical law the ordinary is a Judge who exercises immediate and not delegated Jurisdiction. The word is derived from Roman Law, and depends for its meaning on the distinction between *Judicia ordinaria* and *Judicia extraordinaria* (5).

(1) Bro. P. P. 1.

(2) See sec. 40 (F), *post*.

(3) Shap. Touch. 481.

(4) 2 Bl. 446-47; 2 Steph. 184.

(5) J. Wms. 19.

created Court. This Court was abolished by the Supreme Court of Judicature Act of 1873 [Sta. 36 and 37 Vict. c. 66], by virtue of which the Court of Probate was consolidated into and formed a Division of the Supreme Court of Judicature, and its jurisdiction transferred to the High Court of Justice, and all causes and matters which were within the exclusive jurisdiction of the Court of Probate were assigned to the Probate Division of the High Court (1). [See *In re Ezekiel Abraham, supra*].

Thus ended the jurisdiction of the Ecclesiastical Courts in England. The Probate Division of the High Court now constitutes, for all practical purposes, the only Court in England, empowered to exercise jurisdiction in matters of grants of probate and administration (2).

§ 3. Grants in India—The Mayor's Courts.—The Mayor's Courts were the first English Courts, properly so-called, that were established in India. These Courts were empowered to grant probate of wills and administration to the effects of intestates dying within their jurisdiction: and although they were directed not to entertain suits between Natives unless by consent of the parties (3), as a matter of fact, they did grant probates of Hindu Wills (4). Such grants, however, were made more "upon the principle of convenience and accommodation," than in the exercise of any actual jurisdiction (5). The Mayor's Court was established in Calcutta in 1726, and in Madras and Bombay in 1753 where it existed till 1797.

§ 4. The Supreme Courts.—The Mayor's Courts being abolished the Supreme Courts were established (6). In Bengal the Supreme Court was established in 1774, and continued to administer Justice for the period of 88 years. It was constituted a Common Law Court and a Court of Equity as the Court of Chancery in England. It was also empowered to exercise Ecclesiastical Jurisdiction in Bengal, Behar and Orissa "towards and upon British subjects then residing in the same manner as it is exercised in the diocese of London, so far as the circumstances and occasions of the said provinces or people shall admit or require"; and further to grant probates and administrations to the estates of *British subjects* dying within the said provinces. [See *In re Haji Ismail* (1880), I. L. R. 6 B., 452, at pp. 455-56; and *In re Ezekiel Abraham* (1896), I. L. R. 21 B., 139; *Kurratulain Bahâdur v. Peara Sahib*, 1 Cal. I. J. 594; 9 C. W. N. 938; I. L. R. 33 C., 116; 15 Mad. L. J. 336, L. R. 32, I. A. 244; 7 Bomb. L. R. 876; 2 A. L. J. 758].

The Supreme Court of Madras was established 26 years later, and that of Bombay last of all, *i.e.*, by the end of 1823. The powers granted to these Courts in regard to testamentary matters were similar to those given to the Court in Calcutta, with this difference, that, the Madras and Bombay Courts were empowered, in addition, to issue probates and letters of administration to persons other than *British subjects*. [See *In re Haji Ismail, supra*.]

(1) Wms. 296; Bro. P. P. 2; Tr. and Coote. 9, 10; Walker and Elg. 27.

(2) Walker and Elg. 27.

(3) Cowell's history and constitution of the Courts and Legislative authorities in India (T. L. Lectures, 1872), pp. 13-15.

(4) Montr. Intro. V.

(5) Russell C. J., in *Bebee Muttras's case* (Montr. 159.)

(6) In Madras and Bombay the Mayor's Courts were replaced by the Recorder's Courts. In Madras the Recorder's Court existed for 2 years, and in Bombay till 1823. (Cowell's T. L. Lect. 1872).

§ 5. Power of Supreme Courts to grant probate and letters*—

The first grant of administration to the goods of a Hindu appears to have been made by the Calcutta Supreme Court in the year 1776 [see judgment of Macpherson J. in *Krishnaramani Dasi v. Anand Krishna Bose*, 4 B. L. R. O. C., 231.] This grant, however, was made subject to the condition that the administrator should administer according to Hindu law. In 1791 the same Court reconsidered the matter and decided that probate of the will, or administration of the goods of a Hindu or Mahomedan could not be granted (1). Thus the question whether the Supreme Court of Calcutta had or had not jurisdiction to grant probates of wills and letters of administration as regards the estates of Hindus, was then in an unsettled state.

§ 6. Beebee Muttra's case.—But the question was formally raised and finally decided in 1832, in *Beebee Muttra's case* (2). In that case, as regards the old practice of the Mayor's Court, Ryan J. said: "That it has been the practice of the Mayor's Court, both here and at Madras, to grant such probates, there is no doubt; but it is not correct to say, that the practice here has been uniform. From 1775 to 1782, a period of 7 years, the practice regarding probates does appear to have been uniform; but, from 1782 to 1804, a period of 22 years, there was a total cessation; from 1804 to 1816, a period of 12 years, 6 probates only were granted; and from 1816 to the present time (1832), I believe, they have been uniformly granted. Thus, there has been a nearly total cessation of the practice for half the period the Court has been in existence. At Madras the practice ceased after the establishment of the Supreme Court (1801), and was not revived till shortly before 1812." As to the question of jurisdiction, his Lordship observed: "Since I have been here, it has never been formally argued; although a practice has certainly prevailed of allowing probate of the wills of Hindus. That practice has been acquiesced in by the majority of the Court; I say acquiesced in, because I am not aware that it has ever been stated positively, that the Court has jurisdiction. It now, however, comes upon formally before the Court the question, whether it has or has not jurisdiction to grant probate of the wills of Hindus, and administration of their estates" (3). In the result it was held that the Supreme Court had general Ecclesiastical jurisdiction within the limits of Calcutta, and that by virtue of such jurisdiction it could grant probate of the wills of Hindus who died leaving property there. Thus it came to pass that the practice of granting probate and administration to the estates of Hindus (Natives), was fully established from 1832 (4).

But although the practice of granting probate and letters of administration to the estates of Hindus was thus established, "it was never perhaps very satisfactorily determined upon what basis the jurisdiction rested. It was only established that probates might issue" [Mr. Justice Wilson (now Sir Arthur Wilson)

* The powers of the Mayor's Court and the Supreme Court were originally derived from Charter 13 Geo. I, by virtue of which the Common Law of England, as it prevailed in 1726, came to be introduced and administered within the limits of Calcutta. (See *Advocate Gen. of Bengal v. Rance Surnomoye Dasi*, 9 Moo. I. A. 387, 426; Suth. P. C. J. 1867 pp. 515, 517; 1 Morl. Dig XXII.)

(1) Mayne's H. L. p. 447, § 367; 5th Ed.

(2) Morton I. 75.

(3) Montr. pp. 171, 173.

(4) Mayne's H. L. p. 447 § 367, 5th Edn.; Montr. 153.

in *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan alias Peera Sahab*, 1 L. R. 33 C., 116; 9 C. W. N. 938; 1 C. L. J. 594; 15 M. L. J. 336; 7 Bom. L. R. 876; 2 A. L. J. 758; L. R. 32 I. A. 244].

§ 7. **Grants in Bombay.**—As to the extent of the practice of granting probates and letters of administration in respect of the estates of Hindus, in Bombay, it may be observed that, from 1820 to 1860, 418 wills were filed in the Ecclesiastical Registrar's Office, Bombay (see *Mancharji v. Narayan*, 1 B. H. C. R. 77). The difference noticeable in the practice in the several Presidencies, in point of dates, may be attributed to the fact that, as already seen, the Mayor's Court was established at Madras much later than in Calcutta, and last of all in Bombay. Besides, there were the Recorder's Courts in those two places which had to replace the Mayor's Courts, before the Supreme Courts were established in their stead (1).

§ 8. **High Courts established.**—The power of the Supreme Court to grant probates and letters of administration was expressly confined to the wills of persons leaving effects within the limits of the Court's jurisdiction. In 1862, in accordance with the provisions of Act 24 and 25 Vict. c. 104, the Supreme Courts were abolished and the High Courts of Judicature established under the authority of the Letters Patent or Royal Charter dated the 14th of May 1862; and all the powers of the Supreme Courts in all their several jurisdictions were transferred to such High Courts, which were empowered and authorized by their respective Letters Patent (original and amended) to grant probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate whether within or without their respective Presidencies (2).

It is to be remembered, however, that the High Courts, like their predecessors, the Supreme Courts, have not been conferred with any Ecclesiastical jurisdiction. Speaking of the history of the testamentary jurisdiction of the Courts in India, Sir Arthur Wilson says: "In the course of the series of events by which the British territories in India grew from a group of trading settlements into an empire, various branches of jurisdiction which sprang originally from an Ecclesiastical origin, have come to be applied by a number of Legislative Acts to new territories and new classes of persons, and administered by new tribunals. And in the progress of this development the Ecclesiastical origin of such jurisdiction has been completely discarded, and the Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law, and purporting to be a self-contained system. Even in the case of the High Courts, the successors of the Supreme Courts, (which alone possessed Ecclesiastical jurisdiction) the testamentary jurisdiction which the Charters purport to confer upon them is not given as a branch of Ecclesiastical jurisdiction, and is not made dependent upon the law administered by English Courts. [*Kurrutulain Bahadur* represented by *Akbari Begum v. Peera Sahab*, L. R. 32 I. A. 244; 33 C., 116; 9 C. W. N. 938; 1 C. L. J. 594; 15 M. L. J. 336; 2 A. L. J. 758; 7 Bom. L. R. 876].

§ 9. **Grants before Act XXI, 1870, and Act V, 1881.**—Thus it will appear that before the Probate and Administration Act in cases to which the

(1) See Cowell's T. L. Lect. 1872.

(2) See Letters Patent of 1865 (for Bengal) and 1866 (for N.W. P.).

Indian Succession Act and the Hindu Wills Act did not apply, probate could only be granted by the Supreme Courts, and since their abolition by the High Courts in the exercise of their Testamentary and Intestate Jurisdiction. The Testamentary and Intestate Jurisdiction of the present day is the same as the Ecclesiastical Jurisdiction of old. But, notwithstanding, grants made by the Supreme Courts, and by the High Courts before the Hindu Wills Act, that is, grants which were independent of that Act and of the Probate and Administration Act, conferred upon Hindus a representative status which fell far short of that conferred by similar grants in the case of European British sub-

Rights and powers of executors under such grants.

jects (1). To Hindu executors probate conferred no right of property analogous to the estate or interest conferred upon an English executor [see *Jaykali Debi v. Shib Nath Chatterjee*, 2 B. L. R. O. C. J. 1; *Kherode Money Dassee v. Doorga Money Dassee*, I. L. R. 445 S. C. 3 C. L. R. 315; *Maniklal Atmaram v. Mancharshi Dinsha*, I. L. R. 4 C., 1 B., 269; *Lallubhai Babubhai v. Mankuvarbai*, I. L. R. 2 B., 388; *In re Haji Ismail Haji Abdula*, I. L. R. 6 B., 452, 455-59; *Kurrutulain Bahadur v. Peera Sahib, supra*; *Sakina Bibee v. Mahomed Isnak*, 37 C., 839; 15 C. W. N. 185]. The true position of Hindu executors prior to the passing of the Hindu Wills Act is thus described by Mr. Montriou: "Our Courts have recognized the Hindu executor as one privately appointed, and, by such appointment, vested with competent legal authority to effect and carry out a dead man's wishes, so far as these may be lawfully carried out * * * *. By the testator's death, possession and charge of the estate is, ordinarily, cast upon the executor. Still, it does not follow, that the Hindu executor is, in all respects identical, in power or character, with the hæres (heir), or with what (independently of statute) the English executor may be and has been considered, *i. e.*, *qua* representative; or indeed that they are identical at all, or otherwise than as mandatory or trustee" (2). See *post* secs. 4 (P), 12 (P) and 90 (P).

But in cases of intestacy, it seems the case was otherwise. In *Kadumbinee Dassee v. Koylash Kaminee Dassee* (I. L. R. 2 C., 431), it was held, "that in respect to Hindus, in cases of intestacy, letters of administration granted by the Supreme Court conveyed no more estate than what by the Ecclesiastical law of England vested in the ordinary, or the administrator,—that is to say, personal estate only."

§ 10. Different kinds of grants.—Grants whether of probate, or of administration, with or without will, are of various kinds,—“from the general grant which places the grantee fully in the position of the deceased, to those which limit his representation to a small fraction, as it were, of the deceased's rights or liabilities” (3). *General* grant of probate or administration “is where the grant embraces the whole will or property of the deceased without any reservation whatever as to time, estate or any other object” (4). *Limited* grant is, where the estate of the deceased is only partially committed to the grantee, or where the authority of the grantee, though extending over the whole estate, is limited in duration and scope (5).

(1) Statement of object and reasons for Act V, 1881.

(2) Montr. Intro. VI, VII.

(3) Bro. P. P. 180.

(4) Flood. 683-84.

(5) See Walker and Bigg. 33.

According to Sir E. V. Williams, general letters of administration are granted only in cases of complete intestacy (1). Grants which extend to the whole personal estate of the deceased, and terminate only with the life of the grantee," are either *general or special*, according as they are without or with will annexed; and those only "which are confined to a particular extent of time, or to a specified subject-matter" are *limited* under all conditions (2). Again, there are, several other administrations which are granted "as well *cum testamento annexo*, as in cases of complete intestacy." These are temporary and limited administration (3). See sec. 24 (P), *post*.

- 120. 4 (P)§**—The executor or administrator, as the case may be of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

Character and property of executor or administrator as such.

But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person.

NOTES AND COMMENTS

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| § 1. <i>The section.</i> | § 8. <i>Executor & Trustee.</i> |
| § 2. <i>"Executor or administrator."</i> | § 9. <i>Executor's position.</i> |
| § 3. <i>"Legal representative."</i> | § 10. <i>Continuity of representation.</i> |
| § 4. <i>"All the property of the deceased."</i> | § 11. <i>Vesting in heir or legatee.</i> |
| § 5. <i>"Vests."</i> | § 12. <i>[Proviso] "Passed by survivorship."</i> |
| § 6. <i>Estate or interest of executor or administrator.</i> | § 13. <i>Effect of vesting.</i> |
| § 7. <i>Executor & Receiver.</i> | § 14. <i>Vesting to follow probate.</i> |
| | § 15. <i>Retrospective operation.</i> |

§ 1. **The section.**—This is section 179 of the Indian Succession Act with the exception of the second clause or proviso which is new.

§ 2. **"Executor or administrator."**—This section makes no distinction between an executor and an administrator, so far as vesting of the deceased's property and his representation are concerned. Thus as a "legal representative for all purposes," and as a person in whom *all the properties of a deceased person*

* (P) represents Probate and Administration Act, and (S) the Succession Act. So that '4 (P)' stands for sec. 4 of the Probate and Administration Act, and '179 (S),' for the corresponding section of the Succession Act. The figures 120 represent the serial number of the section.

(1) Wms. 468.

(2) See Wms. 415, 468, 486; Tr. and Coote. 126.

(3) Wms. 520.

vests, there is no difference between an executor and an administrator. [See *Ambica Churn Das v. Kula Chandra Das*, 10 C. W. N 422.]

The principle applicable to both is, that in all matters *** they represent the person of the testator, as the heir does that of his ancestor; so that they, together with the heir of a deceased party, are sometimes compendiously described as his real and personal representatives. And in illustration of this principle, we may further observe, that the executor or administrator has the same property in the chattels of the deceased, including his chattels real (and in this country, realty also), as he himself had when living; and, in general, succeeds to his rights of action; and that he is subject, on the other hand—so far as the assets in his hands are concerned—to his liabilities" (1). See secs. 88 (P), and 89 (P), *post*.

Points of difference between an executor and administrator. The chief points of difference between an executor and an administrator are the following:—

(i) The interest of an executor in the estate of the deceased vests in him from the moment of the testator's death, but that of an administrator from the time of the grant (2). But see *infra*, and sec. 12 (P), § "When granted."

(ii) An executor may do many acts before he obtains probate [sec. 12 (P), *infra*]; but an administrator may do nothing till letters of administration are granted to him (3). See secs. 14 (P) and 15 (P) *post*.

(iii) An executor derives his powers from the will, and not from the grant of probate [see sec. 12 (P), *post*, and § 14 *infra*], but an administrator owes his powers entirely to his appointment by the Court (4).

(iv) An executor is not required to execute a bond (except where the Court otherwise directs) for the due discharge of his duties, but an administrator is bound to execute such a bond [see 78 (P), *post*.]

As regards the office and duty of an executor and administrator, it is to be observed that, they are, in general, very much the same in both, save that the executor is bound to "perform a will," which an administrator is not, unless where a will is annexed to his administration, in which case he differs still less from an executor (5). If, for instance, the testator nominates no executor, or if he names incapable persons, or if the executors named refuse to act [see section 19 (P), *post*], the court is to grant administration with the will annexed to some other person; and then the duty of an administrator, as also when he is constituted an administrator during the minority or the absence of another [see sections 28 (P) to 33 (P), *post*] is very little different from that of an executor (6). "Executors and administrators differ in little else than in the manner of their constitution" (7)

§ 3. "Legal representative."—A *legal representative* is one in whom all the rights and duties of a deceased person are centred; or one, in whom

(1) 2 Steph. 197; Wms. 656; Shep. Touch. 401.

(2) Wms. 636, 637; Shep. Touch. 474; 11. L. of Eng. 6.

(3) See 2 Bl. 460; 2 Steph. 189; Shep. Touch. 474; Wms. 637.

(4) Wms. 637; 2 Bl. 460.

(5) 2 Bl. 460; 2 Steph. 197, 198.

(6) 2 Bl. 460.

(7) Wms. 656.

the deceased lives not as a physical person, but as a legal personality. In other words, a person who represents a deceased in all his legal relations with the world, is a legal representative of that deceased (1).

According to English law, a *legal representative* is either a legal *personal* representative, or a legal *real* representative according as such representative is vested with rights appertaining to real property, or those appertaining to personal property. Thus an heir-at-law or devisee is a legal *real* representative, and an executor or administrator is a legal *personal* representative (2). (i) But in England, since the passing of the Land Transfer Act, 1897, both realty and personalty primarily vest in the legal representatives; so that the difference in the executor's position under wills of realty and wills of personalty has been done away with (Strah. L. of Pro. 291, 5th Edn.)

The words '*legal representative*,' and '*legal personal representative*,' or simply '*representative*,' are sometimes used as synonymous, primarily meaning executors or administrators (3). Thus a bequest of personal estate to the "representatives," or "legal" or "personal" or "legal personal representatives" of any one, means *prima facie*, executors or administrators [*Re Crawford's Trusts*, 2 Drew 230; *King v. Cleaveland*, 4 DeG. and J. 477; *Re Best's Settlement*, L. R. 18 Eq. 686] (4).

An executor represents the estate even before he has taken out probate [see *Shaik Moosa v. Shaik Essa*, I. L. R. 8 B., 241; *Mathuradas Louji v. Goculdas Madhowski* I. L. R. 10 B., 468; *Narandas Ramji v. Narandas Ramji* 9 Bomb. L. R. 287, at 293; I. L. R. 31 B., 418, 428]. But see *infra*, § 14.

§ 4. "All the property of the deceased person".—That is, both moveable and immovable property, or real and personal estate,—not, as under English law personalty only [see *Mancharji v. Narayan*, 1 B., H. C. R. 77]. The words *all the property of the deceased*, "must be construed as meaning only the actual property of the deceased, whether held by him for his own benefit or the benefit of others, and not as meaning property vested in him as executor or administrator" [(Macpherson J., in *De Souza v. The Secretary of State*, 12 B. L. R. 423)]. [See sec. 37 (1), *post*].—This section "gives the executor a right of administration to all the property of the testator which vests in him, wherever situate," in British India or in other countries [*In re Ezekiel Abraham*, I. L. R. 21 B., 139]. [See *post* sec. 145A (1)]. The words "all the property" ought to be construed with reference to sections 62 (1) and 64 (1), *post* (*Ibid*).

§ 5. "Vests"—All the property "vests" from the time of the testator's death, in cases of executors, "the law knowing no interval between the testator's death and the vesting of the right in his representative (5). But see § 9, 11 & 14, *infra*.

(i) The words '*legal representative*' as defined in the new Code of Civil Procedure (Act V of 1908) means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Sec. 2 (11), Act V, 1908.

(1) See Maine's Anct. Lnw. 178.

(2) Wharton. L. Lex; Edw. L. of Pro. 390.

(3) See Wms 1132-34; 1 Jarm. 98, 4th Edn.

(4) Hawk. 107; Underhill. 271.

(5) Wms. 636; Walker and Elg. 139.

"Originally the word 'vest' had reference only to real estate. As applied to estates in land, to 'vest' signifies the acquisition of a portion of the actual ownership or feudal possession of the land: the acquisition, not of an estate *in possession*, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus "vested" is nearly equivalent to 'possessed' (1). Wharton defines the word to mean (a), to place in possession, or to make possessor of; (b) to come into the possession of any one (of a right or interest). See sec. 106 (S), *ante*, p. 383.

Before the Hindu Wills Act, the property of a deceased Hindu did not vest in his executor or administrator. "The word 'vest'" says Markby J., "is not an appropriate one to describe the position of a Hindu executor in a will made prior to the Wills Act" [*Kherode Money Dassee v. Doorga Money Dassee*, I. L. R. 4 C., 455, (1878); *Administrator General of Bengal v. Prem Lal Mullick*, I. L. R. 22 L.A. 107; I. L. R. 22 C., 778, (1895); *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*, I. L. R. 25 C., 103, (1897); *Jugmohandas v. Pallonjee*, I. L. R. 22 B., 1, (1896); *Girish Chandra Roy v. Broughton*, I. L. R. 14 C., 861, (1887); *Joykali Debi v. Shiba Nath Chatterjee*, 2 B. L. R. O. C. J. 1, (1866)]. In other words, independently of the Indian Succession Act and the Hindu Wills Act, the executors of a Hindu will did not, in the character merely of executors, take any estate, properly so called, in the property of the deceased [*Manik Lall Atmaram v. Manchershie Dinsha*, I. L. R. 1 B., 269; *Sakina Bibee v. Mōhomed Ishak* (1910) 37 C., 839; 15 C. W. N. 185].

§ 6. **Estate or interest of executor or administrator.**—Since the passing of the Hindu Wills Act, an executor or administrator is the legal representative of a deceased Hindu and all his property vests in him as this section provides; so that, an executor or administrator, by virtue of his office only, or "in the character merely of executor or administrator," takes an *estate* (2) in the property of the deceased, and a legal character is conferred upon him [*Grish Chunder Roy v. Broughton. supra*]. In other words, he is in the same footing as an English executor [*Jehangir v. Bai Kukibai*, I. L. R. 27 B., 281, 283], with this difference, above all, that he cannot transmit his powers to what is called a derivative executor [*De Souza v. The Secretary of State for India*, 12 B. L. R. 423]. As held by Sir Charles Sargent, C. J. "executors appointed by the particular class of Hindu wills contemplated by the Hindu Wills Act * * acquired the same estate and interest in the property of the deceased, together with the same restrictions as to representing the estate in a Court of Justice, as obtained by English law" [*Shaik Moosa v. Shaik Essa*, I. L. R. 8 B., 241, at 253; *In re Abraham*, I. L. R. 21 B., 139, at 149; *Administrator General of Bengal v. Prem Lal Mullick, supra* at 115]. See Intro. Notes, *supra*, and sec. 90 (P), *post*.

It is to be seen, however, that, "The interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which any one has in his own proper goods. For an executor or administrator has his estate as such in *auter droit* (in another's right) merely, viz., as the minister or dispenser

(1) Hawk. 221.

(2) As to the meaning of the word "estate" see sec. III, *ante* p. 57—58.

of the goods of the dead (1). Executors and administrators "are only trustees of a particular sort" (2). Thus an executor or an administrator with the will annexed, has not as such, any beneficial interest in the property of the deceased [*Lallubhai Babubhai v. Mankuverbhai*, I. L. R. 2. B., 388].

This being so, notwithstanding the pendency of his estate or right of representative ownership, an executor cannot exclude those to whom the testator or the law directs, that the property should go from the deceased. Thus, where it was found that the testator died intestate as to his residuary estate, it was held that his widow, the executrix, although her representative ownership extended over and embraced all the property left by the deceased, was not beneficially entitled to any such residuary estate, as against parties who might have interest therein. "It can never be," says Phear J., "that as representative of the deceased, the executor is entitled to exclude either those to whom the testator or those to whom the law directs that the property should go from the deceased. It seems to me then clear that, if the plaintiff is right in contending that a substantial portion of the property is not validly disposed of by the will, excepting so far as it is vested in the executor *qua* executor, he is, in that event, immediately entitled beneficially to a share in that portion, notwithstanding the pendency of the executor's estate or right of representative ownership." [*Broja Nath Dey Sirkar v. Anand Mayi Dasi*, (1871) 8 B. L. R. O. C. J., 208].

Thus, "an executor has the property only under a trust to apply it for payment of the testator's debts, and such other purposes as he ought to fulfil in the course of his office as executor (3); and an administrator "has as fixed an interest as an executor" [Holt C. J., in *Blackborough v. Davis*, 1 P. Wms. 43]; for, "after the administration is granted, the interest and power of the administrator is equal to and with the power and interest of the executor" (4). Accordingly, "the administrator hath the same power and property over and in the goods and chattels, the same remedy by suit, * * * as the executor; for they differ not in nature, but in name only" (5).

In illustration of the principle that an executor or administrator has his estate as such in *auter droit* (in another's right) merely, it may be observed that, generally speaking, when the character of executor or administrator ceases, the ownership independent of that character commences. "This happens in the case of executors, when the executor is also residuary legatee, and he performs all the purposes of the will, and holds the estate as legatee; * * * and in the case of administrator, when the administrator is the only person entitled to the beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid. Under these and the like circumstances, the executor or administrator will have the estate in his own right; and when he has the estate in his own right, it will be subject to merger" (6). See sec. 115 (P.), *post*.

From the foregoing it seems to be clear, that, the estate or interest of an executor consists in nothing but what constitutes the interest of the deceased, *i. e.*, his rights, duties and liabilities, or what may be called "the purposes of his will."

**Further remarks
on executor**

(1) Wms. 643.

(3) Wms. 643, n (b).

(5) Shep. Touch. 401.

(6) Wms. 648-49, 652; See Sugd. V. and P. Ch. XV, sec. 1, 11th Edn.

(2) Amos. 265.

(4) Shep. Touch. 474; Wms. 656.

Thus an executor represents the legal personality of the deceased, being one in whom all the rights and duties of the deceased are centred. He has therefore nothing to do with the interests of a person in existence. An executor is clothed by virtue of this section with all the rights and duties of a deceased, and this clothing of the executor is his *legal character*. Before the Hindu Wills Act there was no law which could confer upon a Hindu any such legal character. Hence it has been said, that an executor if he held any property before that Act, he held only as manager devoid of this legal clothing or character. [*Kherode Money Dassee v. Durga Money Dassee*, 1 L. R. 4 C., 455; 3 C. L. R., 515; *Joykali Debi v. Shib Nath Chatterjee*, 2 B. L. R. O. C. 1; *Deenomoyee Dassee v. Tara Churn Coondoo Chowdry*, 3 W. R. M. A. 7, (n); *Sharo Bibi v. Baldeo Das*, 1 B. L. R. O. C. 24; *Nilkant Chatterjee v. Peary Mohun Das*, 3 B. L. R. O. C. 7; 11 W. R. O. C. 21; *Maniklal Atmaram v. Manchershhi Dinsha*, 1 L. R. 1 B., 269; *Lallubhai Bapubhai v. Mankuverbai*; 1 L. R. 2 B., 388; *Jugmohandas Vundawandas v. Pallonjee Eduljee Mobedina*, 1 L. R. 22 B., 1; *Administrator General, Bengal v. Prem Lal Mullick*, 1 L. R. 22 C., 788, 795; 1 L. R. 22 J. A. 114; *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*, 1 L. R. 25 C., 103; *Amulya Charan Seal v. Kulidas Sen*, 32 C., 861; 1 C. L. J. 270; *Sakina Bibee v. Mahomed Ishak* (1910) 37 C. 839; 15 C. W. N. 185]—And herein lies the difference between the functions of an executor and a manager. An executor has to do

Executor and manager.

with whatever concerns a deceased person, but a manager is concerned with only the interests of a living being. A manager, for instance, on behalf of a minor, represents the minor's interest only, having nothing to do with the rights and duties of his deceased predecessor. But an executor or administrator has to deal with the "will" and the rights and duties of the deceased only; he has nothing to do with the interests of the minor [see *Ganjessar Koor v. The Collector of Patna* 1 L. R. 25 C., 795; 2 C. W. N. 349; *Taran Singh Hazari v. Ramratan Tewary*, 31 C., 89] so long as he is not declared or appointed his guardian by competent legal authority.

Several executors appointed by one are esteemed in law as but one person; hence there can be no partition between them, for "each hath the whole." So with joint administrators who take the same interest as joint executors. (1).

As the result of holding in *auter droit*, the estate of an executor which he holds *qua* executor does not pass from him on his bankruptcy (2). So an executor cannot bequeath his interest (3). Nor he can assign his office (4). But see section 31 Act II, 1874 (Administrator General's Act), corresponding to sec. 25, Act III of 1913 (Administrator General's Act 1913).

§ 7. Executor and Receiver.—A receiver occupies a position towards the estate in his hands different from that of an executor or trustee; the latter, not acting through or under directions of the Court, do not and cannot, under ordinary circumstances, create obligations binding on the estate in favour of creditors [*Mohari Bibi v. Shyama Bibi*, 1 L. R. 30 C., 937; see *Jagat Tarini v. Noba Gopal*, 5 C. L. J. 270].

(1) Wms 916, 917.

(2) Wms 644.

(3) Wms 649.

(4) Wms 258.

§ 8. Executor and Trustee.—It is very often the case that the same person is executor and trustee, and in such cases it is difficult to determine when an executor ceases to have duties *qua* executor—is *functus officio*, and becomes clothed with the character of a trustee [see the question discussed in *Re Timmis* (1902) 1 Ch. 176]. The rights and duties of an executor are very different from those of an ordinary trustee. And when the testator appoints one merely as an executor, he does not become, by operation of time alone, an ordinary trustee even though all his works *qua* executor have been done and it only remains to retain part of the estate until certain contingencies happen, or until the persons entitled to it are competent to give him a discharge [*Re Mackay* (1906) 1 Ch. 25, at 30, 31, *per* Kekewich, J.]. It is noticeable that, where executors are also appointed trustees, their title to the testator's estate as executors is superior to and takes precedence over that as trustees [*Lockman v. Reilly* 95 N. Y. 64; *Harris v. Ely* 2 N. Y. 138]. Again, the persons with whom the executors deal are not bound to know the state of the testators assets, and there is no presumption, even after several years that the estate has been all administered [*Charlton v. Durham*, L. R. 4 Ch. 438; see *Re Waidanis* (1908) 1 Ch. 123; *Re Verrell* (1903) 1 Ch. 65; *Re Henson* (1908) W. N. 138]. So, a purchaser from an executor must assume, in the absence of anything to the contrary, that even after 20 years, the sale was by the executor in his capacity as such and in due course of administration [*Re Whistler*, (1887) 35 C. D. 561].

But this is certain that, where one has been appointed an executor and also a trustee, and his duties as executor has been fully performed, he becomes as regards the property remaining in his hands, an express trustee and is in precisely the same position as any other person would be if the will had appointed such any other person a trustee, and the executor had transferred to him the trust property [see *In re Mackay supra*]. See sec. 7 (P) § 5—"Where a trustee, an executor," sec. 98 (P) § "Accounts and sec. 115 (P) § 4."

§ 9. Executor's position.—The position of an executor is somewhat anomalous at least from Hindu point of view. All the property of the deceased vests in him, as if, he is the legal heir. But it is not certain yet, whether such vesting takes place from the moment of the testator's death or after grant of probate [see sec. 12 (P)] although in England it takes place from the moment of the testator's death. If it vests after grant of probate, there is nothing to show where the deceased's property is to remain before such grant is made. An executor is again sometimes a manager and sometimes a trustee; and the testator's property vests in his legal heir and legatee or devisee also (§ 11, *infra*). Moreover, the right of an executor to represent the deceased is not exclusive; for there are cases in which persons holding bare possession, have been declared competent to represent him for special purposes [sec. 12 (P) § 5]. According to English law he is a trustee in equity and an executor at common law, or he is both executor and a trustee, simultaneously; and in the latter case, that is, where the testator appoints him not merely as an executor but as a trustee as well, he becomes an express trustee as soon as his duties as an executor are fully performed [see *In re Mackay* (1906), *supra*]. See *infra* §§ 10 & 13.

An administrator, as seen above, is an executor for all practical purposes, except that his title as such is entirely dependent on his appointment by Court. In England, the property of an intestate passes to the Judge of the Court of Probate immediately on his death. There is no such rule in this country but this does not much signify, for here, it passes to the heir. Difficulty may arise where the deceased dies intestate, but without leaving any heir or person qualified to represent. See sec. 190, Indian Succession Act.

§ 10. **Continuity of representation.**—It seems the position of an executor or administrator of a deceased person, is similar to that of a Shebait of an idol so far as continuity of representation is concerned : that is to say, each succeeding executor or administrator forms, as if, a link in the continuing representation of the deceased's estate in the same manner as a succeeding Shebait does of the idol's property (*Prasunna Kumari Dehya v. Golab Chand Babu*, 14 B. L. R. 450 ; L. R. 2. I. A. 145 ; 3 P. C. J. 449]. Thus where a decree is passed against the former administrator of a deceased's estate, it is binding upon the succeeding administrator and cannot be set aside at the instance of the latter except on ground of fraud [*Bai Meharbai v. Magan Chand* I. L. R. 29 B., 96 ; 6 Bomb. L. R. 853].

§ 11. **Vesting in heir or legatee.**—All the property vests in the executor or administrator. This is what this section lays down. But the property vests in the heir or legatee also. An heir or a legatee may not be entitled to possession of what he inherits or is bequeathed to him except in the proper course of administration ; but that does not mean that he acquires no interest till then [*Ramanuja Ammal v. Swami Pillai* (1911) 22 M. L. J. 228 ; *Jehangir v. Bai Kukibai* I. L. R. 27 B. 281]. The English law is the same. For, we have on the authority of Mr. Joshua Williams, that "the heir still succeeds (under the English Land Transfer Act. 1897) immediately upon his ancestor's death to the beneficial interest in the lands held by the ancestor in fee simple ; but at law the estate of the deceased vests at once in his executors, if he should have left a will appointing executors" (1). And, where the deceased dies intestate, or testate but without appointing executors, his estates "vest in his administrator so soon as appointed" (2). (a).

§ 12. [**Proviso**] "**Passed by survivorship.**"—This clause saves the rights of members of a Hindu joint family *i.e.*, coparceners. There is no such thing as succession, properly so called, in an undivided Hindu family governed by the Mitakshara. The normal condition of such a family consists in the fact that "no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share." It follows, therefore, that in a joint family governed by the Mitakshara, succession takes place by survivorship and not by inheritance. It is this right of succession by survivorship which this section saves.

(a) But the English law of legal and beneficial or equitable interest is not applicable in this country ; so that, perhaps it is not correct to say that the beneficial (or equitable) interest passes to the heir and the legal title vests in the executor. But yet, it seems, it is not possible to discard the legal and equitable principles of that law as to which see *infra* § 12, last para.

The difficulty arises from the fact that according to English law the interest of a beneficial owner is not, strictly speaking, ownership at all. For, where there is a trustee or an executor or administrator who is the legal owner, it is such owner only that can legally sell or dispose of the trust property and can give good title to the purchaser, without the consent of the beneficial owner. Thus the title and the ownership of a legal owner, that is, those of an executor or trustee, are practically superior in some respects of vital importance, to those of the *cestui que trust* or beneficial owner, so that the latter is or may be at the mercy of the former. The introduction of legal and equitable ownership among the Hindus necessarily involves the introduction of these technicalities, which may be regarded as subversive of their cherished notions as regards right of property. See *infra* § 12, last para.

(1) Wms. 916, 917 ; Walker and Elg. 133.

(2) Wms. 644 ; Walker and Elg. 134.

One L. died at Surat in 1873 possessed of ancestral property situate partly in Bombay and partly in the Surat district. He left a widow and a minor son. By his will he bequeathed his property to his son, appointing certain executors to manage the property during his minority. The son died in 1877, leaving a minor widow M, and in 1879 one of the executors obtained probate of L's will from the High Court of Bombay. In 1884, M. instituted a suit against her mother-in-law, the widow of L, to recover possession of the property covered by the will. One of the defences to this suit was that the property in dispute had vested in the executor, and that as the defendant held it under the executor, the suit was not maintainable without impleading the latter. It was held, that the property in dispute being joint ancestral property, on the death of L. it vested in his minor son by survivorship, and on such son's death it vested in his widow, the plaintiff; so that, under section 4 of Act V of 1881 the estate of L. did not vest in the executor, as it had passed by survivorship to another person. [*Bai Harkor v. Maniklal*, I. L. R. 12 B., 621; see *The Collector of Ahmedabad v. Savchand Ladukchand*, I. L. R. 27 B., 140].

It seems there is a distinction between a *legal title* to, and a *beneficial interest* in, property; so that, there may be cases where the latter interest passes by survivorship, but the former title does not. In such

A distinction.—
legal and beneficial.—cases probate or letters of administration are necessary in support of the legal title. [See sec. 23, of the Presidency Banks Act, XI of 1876]. Thus, where certain shares of the Bank of Bombay stood in the name of one Sarabhai, and after his death his minor son applied to the Bank to have the shares transferred to his name as the sole surviving coparcener, it was held, that having regard to the said section 23, the legal title did not survive, though the beneficial interest did, and probate or letters were necessary for the transfer of the shares [*Bank of Bombay v. Ambalal Sarabhai*, I. L. R. 24 B., 350. See *Re Desu Manavala Chetty* (1909) I. L. R. 33 M., 93, F. B., 19 M. L. T. 591.]

§ 13. Effect of vesting—The property of the deceased vests in the executor not “in trust for any specific purpose” within the meaning of sec. 10, Indian Limitation Act (XV of 1877). See *Kherodemoney Dassee v. Doorgamoney Dassee*, I. L. R. 4 C., 455; S. C. 3 C. L. R. 315; *Nanlal Lallnbhoy v. Harlochand Jagusha*, I. L. R. 14 B., 476; *Vundravandas Purshotamdas v. Cursondas Govindji*, I. L. R. 21 B., 646.

The vesting of property under this section results in the fact, that an executor has “an appearance of interest,” or at least a contingent interest, until he takes out probate [*Jehangir v. Bai Kukibai*, I. L. R. 27 B., 281].

An executor or administrator so completely represents the testator or intestate, that, in all suits concerning property vested in him, when the contention is between the persons beneficially interested in such property and a third person, “it shall not be ordinarily necessary to make them parties to the suit” (1). See *Mohananda Chatterjee v. Akhoy Kumar Barori*, 6 C. W. N. 488.

§ 14. Vesting to follow probate—This section has been interpreted to indicate that the vesting is only to follow upon the grant of probate of the will in the case of an executor, in the same manner as it follows grant of letters of administration in the case of an administrator [*Sarat Chunder Banerjee v. Bhupendra Nath Bosu*, I. L. R. 25 C., 103, at 106, per Sir Francis Maclean C. J.; to the same effect, Sir Richard Garth C. J. in *Behary Lall*

(1) Sec. 437, Code of Civil Procedure (Act XIV. of 1882). Corresponding to Or. XXXI. r 1 of Act 1908.

Sandyal v. Juggo Mohan Gossain, I. L. R. 4 C., 1. See *Shaik Moosa v. Shaik Essa* (1884), 8 B., 241, and the judgment of Sir Arthur Wilson in *Kurrutulam Bahadur v. Peara Saheb* (1905), 33 C., 116, and also *Munisami Chetty v. Maruthammal* (1910), 20 M. L. J. 689]. But see *Jehangir v. Bai Kukibai*, I. L. R. 27 B., 281. See *post* sec. 12 (P) §. "When granted."

§ 15. **Retrospective operation**—This section has no retrospective operation. That is to say, it has no application in cases of wills executed previous to the passing of the Hindu Wills Act, and it does not accordingly operate to vest in executors the estate of a deceased Hindu who died before that Act. At first sight it would appear that, this section read with section 2 (P), *supra*, leads to a contrary view; for the latter section purports to provide that the former is to apply in the case of every Hindu dying before the 1st of April 1881, so as to make its provisions applicable to all cases irrespective of any restriction as to the time of the execution of the will. But such is not the case. Because, "If we look to the preamble of the Act, it is there stated that the Act is intended to provide for the grant of probates of wills and letters of administration to the estates of deceased persons, in cases to which the Indian Succession Act does not apply; that is the object of the Act—the grant of probates of wills and letters of administration. The Act did not come into force until April 1881, and to my mind it would be a very strong conclusion to draw from the words of section 2 'dying before the 1st April 1881' that it was intended—this Act having been passed for the purpose which I have stated above—that section 4 should have a retrospective operation, so as to vest in an executor appointed under a Hindu will an estate which but for that section would admittedly not otherwise vest in him" [*Sarat Chunder Banerjee v. Bhupendra Nath Basu*, I. L. R. 25 C., 103 at 105-6, *per* Sir Francis Maclean C. J.; *Amulya Charan Seal v. Kalidas Sen*, 32 C., 861; 1 C. L. J. 270].

121. 5 (P).
180 (s) —When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether in the British dominions or in a foreign country, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

Administration
with copy annexed
of authenticated copy
of will proved
abroad.

NOTES AND COMMENTARIES.

- § 1. *The Principle.*
- § 2. *Practice in England.*
- § 3. *Jurisdiction.*
- § 4. *Procedure.*

- § 5. *Where the rule not applied.*
- § 6. *Domestic jurisdiction not exclusive.*
- § 7. *Exemplification.*

- § 8. *Form of exemplification.*

§ 1. **The principle.**—Mr. Justice Story says: "In regard to the title of executors and administrators derived from a grant of administration in the country of the domicile of the deceased, it is to be considered that that title cannot, *de jure*, extend, as a matter of right, beyond the territory of the Government which grants it. It has hence become a general doctrine of the

Common law, that no suit can be brought or maintained by an executor or administrator in his official capacity in the Courts of any other country except that from which he derives his authority to act, by virtue of the probate or letters testamentary, or the letters of administration there granted to him. If he desires to maintain a suit in any foreign country, he must obtain new letters of administration and give new security according to the rules of law prescribed in that country before the suit is brought" (1).

It is thus clear that, as an English grant, whether of probate or letters of administration, can have no direct operation out of England, so a grant in a foreign country, of probate or letters, has no direct operation in England or in any other country (2). This principle applies in India.

§ 2. **Practice in England.**—So the practice in England is "to follow the grant of the Court of the testator's domicile, not merely as to the document which that Court has admitted to probate, but also as to the person to whom the grant is made as the person declared to be entitled by a Court of competent jurisdiction" (3); and if any part of the property be in England, to admit to probate a duly authenticated copy of the will in respect of which such grant was made without any further evidence as to the validity of the same [*Miller v. James*, L. R. 3 P. and D. 4; *In re Smith*, 16 W. R. (Eng. 1130; *In re Earl*, L. R. 1 P. and D. 450; *In re Rule*, L. R. 4 P. D. 76; *In re Hill*, L. R. 2 P. and D. 89; *In re Dost Ali Khan*, L. R. 6 P. D. 6. See *In re Lemme* (1892) P. 89] (4). In such cases the duty of the English Court would be, as it were, "ministerial merely, to grant ancillary probate or administration." See *infra*, sec. 145A (P).

But in certain cases such duty is not merely mechanical or ministerial, but the Court must exercise its own judgment and discretion [*In re Weaver* (1867) 36 L. J. P. & M. 41]. And where the foreign grant of probate is to one who is not an executor according to English law, or is personally disqualified from taking the grant, the English Court (or the Indian Court) instead of making a grant of probate will grant letters of administration with the will annexed, under section 73 of the English Probate Act or Sec. 41 (P) *post* [*In re Meatyard* (1903) P. 125; see the observations of Lord Penzance in *In re Earl*, *supra*]. The rule laid down by Sir C. Cresswell in *Crispen v. Doglioni* [(1866) 3 Sw. & Tr. 96], for the guidance of the Courts in such and similar cases is to the effect that "the judgment of the Court of domicile of the deceased is binding on the Court of a foreign country, in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign Court which have been decided by the Court of domicile" (5). [See *Re Briesemann* (1894) P. 260; *Re Hill*, *supra*; *Re Von Linden* (1896) P. 148; In the estate of Levy (1908) P. 108; *Re Weaver*, *supra*; *Re Meatyard*, *supra*].

In *In re Smith* (*supra*) Lord Penzance said: "It is a general rule on which I have already acted, that when a person dies domiciled in a foreign country, and the Court of that country invests any body, no matter whom,

(1) Story's conflict of laws, § 512, 8th Edition; Wms. 269-273, 10th Ed. Mort. 25.
(2) Dicey, Confli. of L. 343, 443; Ingpen, 160; Mort. 20-22; 14 L. of Eng. 164; Jarm. 6-8 6th Ed.

(3) Bro. P. P. 51; Powl. and Oak. 148, 4th Ed

(4) Wms. 366-76; Wms. 259-273 10th Ed.; Bro. P. P. 46, 51; Walker and Elg. 33, 34, 100; Theob. 73, 5th Edn.; Tr. and Cooté 223-29.

(5) Wms. 278-280, 10th Ed.; 14 L. of Eng. 164; Mort. 22-23; Jarm. 7, 6th Ed.

with the right to administer the estate, this Court ought to follow the grant, simply because it is the grant of a foreign Court, without investigating the grounds on which it was made, and without reference to the principles on which grants are made in this country." Thus if the will has been previously proved and deposited in the Court of another jurisdiction, or as this section provides "in a Court of competent jurisdiction, situated beyond the limits of the Province," the executor may prove an authentic copy, *i. e.*, an exemplification or office copy, *loco originalis*, and on such copy (*i. e.*, in the words of this section, "a properly authenticated copy of the will") being produced, "letters of administration may be granted with a copy of such copy annexed" to the executor (1).

§ 3. Jurisdiction.—The jurisdiction of the Court of Probate is founded on the existence of property within the country where such jurisdiction is exercised; so that if the deceased has left no property there, the Court has no jurisdiction to grant administration. But in such cases if he dies testate and purports to exercise a power of appointment affecting property in that place, probate will be necessary, although there is no property of his own. So, a testator disposing of property in England in the exercise of a power of appointment, is entitled to probate in the English Court, although the will was not executed according to the formalities prescribed by the law of his domicile [*Re Hallyburton* (1866) L. R. 1 P & D. 90; *Re Huber* (1896) P. 209; *Re Trefond* (1899) P. 247; see *Murphy v. Deichler* (1909) A. C. 446] (2).

The above is an exception to the general rule that a will in order to be valid must comply with the law of the testator's domicile. The reason is, that the appointee of the power takes, not under the instrument exercising but under the instrument creating the power; so that if the will is executed in the form required by the power, the formalities required by the law of the testator's domicile become unnecessary (3).

But it seems to be established that before granting probate of a foreign will the Court must be satisfied either that the will is valid according to the law of the country where the testator was domiciled, or that a competent Court of that country has acted upon it declaring it to be valid [*In re Deshais* (1865) 34 L. J. P. & M. 58] (4).

§ 4. Procedure.—The procedure has been laid down by Sir Charles Farran C. J. of the Bombay High Court, in these words: "If a foreign will has already been proved and deposited in a competent Court abroad, section 5 of the Act (V of 1881), following the English law, enables a Court in British India to grant letters of administration to the applicant with a properly authenticated copy of such will annexed, and thus to dispense with the necessity of proof of the original will; but where a foreign will has not been so proved, the Judge will have himself to take evidence as to the due execution of the will, according to the law of the country in which the testator was domiciled, in cases where the property in respect of which probate is sought is moveable or personal property, and must, if necessary, satisfy himself by evidence as to the law relating to the execution of wills in force in such country" [*Bhanrao Dadairao v.*

(1) Coote, 52; Tr. and Coote, 53, 406.

(2) Juggen, 155, 158; Jarm. 9-10, 6th Ed.; Wms, 283, 10th Ed.; Mort. 36.

(3) Jarm. 9-10, 6th Ed.; Farwell, 144, 1st Ed.

(4) Wms. 272, 10th Ed.

Lakshmibai, I. L. R. 20 B., 607]. But if the property be immoveable and in British India, the validity of a will purporting to dispose of such property, "must be tested by the rules applicable to the execution of wills in British India." (*Ibid*).

Accordingly, where the executor of a will proved at the Native Court at Cutch, instituted a suit in South Malabar, in British India, on the authority of a copy of the probate granted by that Court and certified by the Political Agent of Cutch, it was held that, that copy was not sufficient to establish the plaintiff's (executor's) right to maintain the suit. In delivering the judgment of the Court, their Lordships of the Madras High Court (Collins C. J. and Wilkinson J.) said: "The Court of the District Judge of South Malabar having been * * authorized to receive applications for probate or letters of administration under Act V, 1881, it was open to the plaintiff to obtain under section 5 of that Act letters of administration with a copy of the will annexed" [*Mana Singh v. Ahmad Kunhi* (1892) I. L. R. 17 M., 14; see *In the goods of Newton*, (1872) 8 B. L. R. App. 76].

Where a will has been proved in England and probate granted, the attorney of the executors empowered to obtain limited grant only, is not competent to make any application under this section [*In re Ashton*, A. W. N. (1905) 251].

§ 5. Where the rule not applied.—The rule to follow the foreign grant does not apply where the foreign grant is made not to the person entitled to it but to some other person with the consent of the person entitled [*Re Weaver* (1867) 36 L. J. P. & M. 41].

So, where the foreign grant is to an executor whose powers fall short of the powers of an English executor, the English Court will grant an administration with powers as near as may be to those granted by the will (foreign) [*Re Von Linden, supra.*]. It has been held, however, in *In the Estate of Levy* [(1908) P. 108] that if the foreign grant of administration is limited in time, the English Court will make a general grant to the foreign administrator (a).

§ 6. Domestic jurisdiction not exclusive.—The rule formerly prevailed that the Court of a country had no jurisdiction to make any grant of probate or letters in respect to the property of a person domiciled abroad, unless and until recourse had first been had to the Court of the country of that person's domicile [*De Bonneval v. Bonneval* (1838) 1 Curt. 856]. But this view of the law is no longer strictly adhered to; for, it seems to be now settled, that although, as seen above, and as this section provides, foreign grant is to be followed, it is not true that the Courts of domicile have exclusive jurisdiction in such cases, but that the person entitled to represent by the *lex domicilii*, may at his option and without any restriction, apply in the first instance for grant of probate or letters of administration in the Court of the country where the deceased's property or a portion of it lies. Where, however, a proceeding is

(a) Foreign administrator or representative, does not refer to the mere non-residence of the person holding the office, but to the foreign origin of the representative. Thus if a representative appointed in one jurisdiction takes out ancillary letters of administration in another, he thereupon becomes a domestic representative within that jurisdiction (1). See *infra* sec. 145 A (P).

pending in the Court of domicile, proceedings in the foreign Court ought to be stayed [see *Trimbletown v. Trimbletown* (1830) 3 Hagg. 243] (1).

§ 7. Exemplification.—The “properly authenticated copy of the will” referred to in this section is technically called ‘exemplification.’ See *In re Newton*, 8 B. L. R. App. 76.

For an example of a grant of probate of exemplification see *In re Gubboy*, 4 C. W. N. vii.

The copy must be one admissible under the Indian Evidence Act. That is to say, such copy must purport to be a copy made from the original will and must bear certificate to the effect that it had been compared with that original [*Re Adam Whyte*, 14 Bur. L. R. 33]. See sec. 63, Indian Evidence Act.

§ 8. Form of exemplification.—The following form of exemplification of probate or of letters of administration with the will annexed, is taken from Tristram and Coote’s Probate Practice, 12th Edition.

In His Majesty’s Court of Probate. The District Registry at——.

BE IT KNOWN, that, upon search being made in the district registry* attached to His Majesty’s Court of Probate at—— it appears that, on the——day of——in the year of our Lord 19——the last will and testament (with codicils, if any) of A. B., late of——deceased, who died at——on or about——19——and had at the time of his death a fixed place of abode at——within the district of——was proved by C. D., the executor named therein [or letters of administration with the last will and testament annexed of A. B., late of, &c., were granted to C. D., as the——], and which probate [or letters of administration] now remain of record in the said district registry. The true tenor of the said will [and codicils] is in the words following, to wit :

[Here follow the will and codicils].

In faith and testimony whereof these letters testimonial are issued.

Given at——as to the time of the aforesaid search and the sealing of these presents, this——day of——in the year 19——.

(Signed).

Probate to be granted to executor appointed by will.

122. 6 (P)
181 (S).—Probate can be granted only to an executor appointed by the will.

NOTES AND COMMENTARIES.

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| § 1. <i>Of what probate may be granted.</i> | § 4. <i>Persons who may be appointed executors.</i> |
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* See sec. 81 (P) *post*. No special public Registry for wills has yet been established in this country.

§ 1. Of what probate may be granted.—As a general rule, every instrument containing a testamentary disposition of property is entitled to probate. A testamentary instrument appointing an executor may be admitted to probate, though it makes no attempt to dispose of any property [*Brownrigg v. Pike* (1882), L. R. 7 P. D. 61; *Stewart v. Stewart* (1901), 177 Mass. 493] (1), or the executor is, in the opinion of the Court, not a fit person to be entrusted with that office [*Hara Coomar Sircar Durgamoni Dassi*, I. L. R. 21 C., 195]; or the instrument turns out to be inoperative (2); or the disposition is void or illegal [*Behary Lall Sandyal v. Juggo Mohun Gossain*, I. L. R. 4 C., 1; *Hurmusji Navroji v. Bai Dhanbaiji*, I. L. R. 12 B., 164]. Where several testamentary papers constitute “one sole will,” (a) the Court will grant probate of the will as contained in those papers [*Lemage v. Goodban*, L. R. 1 P. & D. 57; *In the goods of Morgan*, L. R. 1 P. & D. 214; *In the goods of Nickalls*, 4 Sw. & Tr. 40] (3).

But if there are two testamentary documents of the same date or are undated, and it cannot be ascertained which of them was executed first, and their provisions are so inconsistent that they cannot stand together, neither document will be admitted to probate [*Townsend v. Moore*, (1905) P. 66]. If however, the inconsistencies are not such as they cannot stand together, *i.e.*, if they are merely apparent, and both were intended to be effective, then both will be admitted to probate (*Ibid*).

A will made in the exercise of a power is required to be proved and is entitled to probate [Sugden on powers, 466, 8th Edn; Farwell 134, 2nd. Edn.; Wms. 302, 10th Edn.]

The whole instrument is not necessarily to be admitted to probate: a will may in part be admitted to probate, and in part rejected, as where a clause has been inserted in a will by fraud, without the knowledge of the testator, or by forgery after his death [see *Girish Chandra De v. Rashbehary De*, 1 Cal. L. J. 109 (4)]. So one portion of a will may be admitted to probate, when the other portion is lost; and where the contents of a lost will are not completely proved, probate can be granted to the extent to which they are proved (5). [*Kedar Nath Mitter v. Sorojini Dasi* 3 C.W.N. 617; *Sugden v. Lord St. Leonards* L. R. 1 P. & D. 154; *Woodward v. Goulstone*, L. R. 11 App. Cas. 469]. See *post*, secs. 24 (P), 25 (P) & 42 (P) § 4.

So where the main body of the instrument was not a will, being a deed transferring a trust, but there was a residuary clause in these words—“the said

(a) “One sole will.”—It is said that a man cannot die leaving two wills and his *last will* must be one in number. This is, of course, true but it seems, in a technical sense only. Cases are not wanting to show that many have died leaving more than one independent wills. This apparent inconsistency may be explained by the following:—“it is the aggregate or the net result that constitute his (the testator's) will, or in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing it is discarded. But all that survive this scrutiny form part of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will” [Jud. Comm. in *Douglas-Mensies v. Umphelby* (1908) A. C. 233] (6).

(1) Wms. 157, 301, 10th Edn.; Rood, § 64.

(2) Bro. P. P. 100.

(3) Tr. and Coote 53; Coote 52; Wms. 165; Bro. P. P. 104; Theob. 37, 38 3rd Edn.;

(4) Wms. 382; Bro. P. P. 123; Walker & Elg. 24.

[43, 5th Edn.

(5) Tr. and Coote 128, 129, 412, 413; Wms. 386; Bro. P. P. 127.

(6) Jarm. 37, 38, 6th Edn. Theob. 74, 5th Edn.

K. shall get and shall be entitled of his own accord to make a gift or sale of any other property that I may earn during my life-time," it was held that the instrument as a whole, was entitled to probate [*Baisnav Charan Das Bairagi v. Kisore Das Mohanta* (1911) 15 C. W. N. 1014].

A document duly executed but not disposing of any property, or simply revoking a will, is not of a testamentary character, and will not be entitled to probate [*In the goods of Fraser*, L. R. 2 P. & D. 40] (1). In *Brenchley v. Still* (2 Rob. 162), however, a contrary view was taken (2). Generally speaking, a document which disposes of no property (for instance where the will appoints a *shebait* or next *shebait* only (3), has no testamentary character so as to enable the Court to grant probate of it [*Mohunt Bhagaban Ramanuj Das v. Mohunt Raghunandon Ramanuj Das*, L. R. 22 I. A. 94; I. L. R. 22 C. 843; *Chaitanya Gobinda Adhikari v. Dayal Gobinda Adhikari*, 9 C. W. N. 1021; 2 Cal. L. J. 50 n; I. L. R. 32 C., 1082; See *Baisnav Charan Das Bairagi v. Kisore Das Mohanta* (1911) *supra*; *Van Stranben zee v. Monck*, 3 Sw. & Tr. 6] (4). So a will merely appointing testamentary guardians is not entitled to probate [*In the goods of Morton*, 5 Sw. & Tr. 422; *Lady Chester's Case*, 1 Vent. 207; *Gilliat v. Gilliat*, 3 Phill. 222 (5); *In re Bukthavwar Mull Sowcar*, I. L. R. 23 M. 133. See *Tara Churn Chatterjee v. Suresh Chandra Mookerjee*, I. L. R. 17 C., 122; L. R. 16 I. A. 166, where the will "provided for the management of the property," but gave no beneficial interest to any].

An instrument disinheriting an heir by negative words only without any disposition of his properties, is not of a testamentary character and is not entitled to probate—See *Ante*, sec. III, "Disinheritence."

A codicil only may be admitted to probate when the will is not forthcoming at the testator's death, or under similar circumstances, if the testator intended it to operate independently. [*In the goods of Savage*, L. R. 2 P. & D. 78; *Black v. Jobling* L. R. 1 P. & D. 685] (6). See section 10 (1'), *post*.

A will disposing of property in a foreign country only shall not be admitted to probate [*In the goods of Coode*, L. R. 1 P. & D. 449; but see *In re Winter*, 30 L. J. P. & M. 56; *In re Briesemann* (1894) P. 260; *In re Von Linden*, (1896) P. 148] (7).

But if, of two independent wills one disposes of property in England or in this country, and the other disposes of property in some other country the former only will be admitted to probate in England or in this country, as the case may be [*Re Astor* (1876) 1 P. D. 150; *Re Seaman* (1891) P. 253; *Re Fraser*, *Ibid*, 285; *Re Tamplin* (1894) P. 39]. If, however, the two wills are not independent and one refers to or confirms the other in such a way as to incorporate it, [sec. 51 (s), *ante*] both will be included in the probate, for they become virtually one document [*Re Harris* (1870) L. R. 2 P. & D. 83; *Re Green* (1899) 79 L. T. 738].

(1) Tr. and Coote 41; Wms. 129; Bro. P. P. 91.

(2) Wms. 394; Bro. P. P. 91; Walker & Elg. 25.

(3) See sec. 45 (P) § 4.

(4) Wms. 394, (9).

(5) Wms. 398; Walker and Elg. 25; Theb. 61, 3rd Edn.; 70, 5th Edn.

(6) Coote 52; Tr. and Coote 54; Wms. 156-57; Bro. P. P. 84.

(7) Wms. 436; Tr. and Coote 41; Bro. P. P. 43; Walker and Elg. 24; Theob. 62, 3rd Edn.; 72, 5th Edn.

A will to take effect upon a contingency cannot be admitted to probate if the contingency does not happen [*In the goods of Hugo*, 2 P. D. 72]. But a contingent or conditional codicil will be admitted to probate, under the same circumstance, as it may have the effect of republishing the will. [*In re Da Silva*, 2 Sw. Tr. 315] (1).

Probate will also be denied when the will is made to depend on an event which turns out against it during the lifetime of the testator, [as for instance, where the testator says "Instructions to be followed if I die at sea or abroad," *Lindsay v. Lindsay* L. R. 2 P. & D. 459], or after his death but before probate [*In re Smith*, L. R. 1 P. & D. 717], or which had not happened when the testator died and by any possibility might happen later than the time allowed by the rule against perpetuity (2). But there are cases in which probate has been granted although at the time of the testator's death it was uncertain whether the condition on which the will was to take effect, would or would not happen [*In re Cooper*, 1 Dea. & Sw. 9; *In re Baugham*, 1 P. D. 429].

As a general rule, probate is granted of the will latest in date (3).

Papers incorporated with the will by the testator's reference are, as a general rule, to be included in the probate (4). But this is a question mainly one of convenience (5). See section 51 (S) *ante*.

A will appointing "executor for all property not named in the will" cannot be entitled to probate, "because an executor must be the person who has to deal with the property which is left by will." [*In re Wakeham*, L. R. 2 P. & D. 359] (6).

Copy or draft of a will, or even the contents thereof, in the absence of such copy or draft, may be admitted to probate. See sections 24 (1), 25 (1), 26 (P), *post*.

Wills of Hindus made before the Hindu Wills Act may be admitted to probate [*Krishna Kinker Roy v. Rai Mohan Roy*, 1 L. R. 14 C., 37]. See section 187 (S), *ante*.

Wills made for valuable consideration are not entitled to probate [see *Re Robinson*, L. R. 1 P. & D. 383]. But some American Courts have allowed probate of such wills on the ground that unrevoked wills should not be denied probate [*Day ex parte*, 1 Brad. Sur. (N. Y.) 476].

§ 2. "Can be granted only to an executor."—Probate being the confirmation of the appointment made by the testator, it is natural that it should be granted to the party whose appointment is confirmed thereby. Hence, an executor being a person appointed by the testator, "probate can be granted only to an executor." And, as, in order that one may obtain probate, it is necessary that he should prove the will, the general rule is that, *an executor is the only person who can prove the will*. As a matter of fact, however, there are other persons, viz, a universal legatee, a residuary legatee, &c., who may also prove it. But such persons are not entitled

(1) Wms. 193; Bro. P. P. 101; Walker and Elg. 25; Theob. 54, 61, 3rd Edn.; 70, 5th Edn.

(2) Rood, § 67.

(3) Tr. and Coote, 55.

(4) Coote, 53.

(5) Theob. 64, 3rd, Edn.; 73, 5th Edn.

(6) Flood. 567; Bro. P. P. 141; Theob. 72, 3rd. Edn.; 84, 5th Edn.; Walker and Elg. 27.

to probate, for it is a settled rule that persons proving a will in any character other than that of an executor takes letters of administration with the will annexed, and not probate (1). Hence an executor is entitled before all others to prove the will (2). See sections 18 (P), 19 (P), 21 (P), *post*. Probate granted to an universal legatee by mistake, is invalid *ab initio* [*Pundit Prayrag Raj v. Goukaran Pershad Tewary*, 6 C. W. N. 787].

If follows, therefore, that an executor cannot take administration with the will annexed; but if he has renounced he may take it as attorney of other executors [*Re Russell*, L. R. 1 P. & D. 635]

§ 3. "Appointed by the will."—"An executor can derive his office from a testamentary appointment only." So, where there is no will there is no executor; for, "a will is the only bed where an executor can be begotten or conceived" (3). Formerly an executor could not be primarily appointed by a codicil, though one could be added or substituted by it (4). But now one may be primarily appointed as well by a codicil as by a will, the former being a part of the latter (5).

§ 4. Persons who may be appointed executors.—"Any person that may be a legatee and take by the devise of goods and chattels, may be an executor; and therefore it is said that any person or persons, male or female, of the clergy or laity, children or strangers, friends or enemies, married or unmarried, creditor or debtor, bond or free, may be an executor. And that a bastard, an excommunicate, or an outlawed person, may be as able and as absolute an executor as any other" (6). "Generally speaking," says Mr. Justice Williams, "all persons who are capable of making wills and some other besides, are capable of being made executors" (7). Thus an infant, whether male or female, and even a child *in ventre sa mere* (in his mother's womb), though incapable of making wills, may be appointed an executor. So outlaws and felons, and even bankrupts or persons declared insolvent, a firm of partnership, and a corporation sole or aggregate, may also be appointed executors (8).

Where a limited company were appointed executors, administration with the will annexed was granted to the general manager as their nominee [*Re Hunt*, (1896) p. 288]; and a firm being similarly appointed, it was held, that the appointment was of the persons composing it individually and each of the members was accordingly entitled to prove the will [*Re Fernie* (1849) 6 No. of ca. 657].

The Official Trustee may be appointed an executor [*Re Manick Lal Seal*, L. L. R. 35 C., 156]. But see *Grey v. Charusila Dasi* [(1910) 38 C., 53] where it was held by Sir L. Jenkins, C. T. that the official Trustee in his character as such cannot be appointed an executor or administrator and is not, therefore, entitled to a grant of probate or letters of administration.

§ 5. Persons who may not be appointed executors.—Idiots and lunatics, or generally speaking, persons of unsound mind, are incapable of

(1) Bfo. P. P. 202.

(2) Tr. and Coote 42

(3) Wms. 243, n (a); Walker and Elg. 1,

(4) Wms. 8, 243, n (p) and (a) respectively.

(5) See Wms. 7.

(6) Shep. Touch. 460.

(7) Wms. 232.

(8) Wms. 232-43; Walker and Flg. Chap.

being appointed executors or administrators (1). But it is said there is no restriction as regards choice of an executor, so that a person of unsound mind may be appointed on this condition only that probate will not be granted to him during the period of his disability (2). Mere weakness of mind is not sufficient to disqualify any one [*Evans v. Tyler*, 2 Rob. 131, 132] (3). See section 8 (P), § 3 *post*.

§ 6. **Court's discretion.**—The Court has no discretion in making a grant to an executor [*Pran Nath Ghose v. Jadu Nath Bhattacharjee* (1897) 20 A., 189; *Hara Coomar Sirkar v. Doorgamoni Dasi* (1893) 21 C. 195]. An executor cannot be refused probate by reason of bankruptcy, felony [*Smethurst v. Tomlin* (1861) 2 Sw. & Tr. 147], bad character [*Re Samson* (1874) L. R. 3 P. & D. 48], or fraud [*Re Mary Hile*, 6 Jur. 350]. All that the Court can do in such circumstances to protect the interest of the deceased, is to call upon the executor to furnish security before making the grant to him. See sec. 78 (P) *post*, § 6.

123. $\frac{7(P)}{182(s)}$ —The appointment may be express or by necessary implication.
Appointment, express or implied.

Illustrations.

(a). A wills that C be his executor if B will not. B is appointed executor by implication.

(b). A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law C, and adds, "but should the within-named C be not living, I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication. (See *Nator v. Stainsby*, 2 Cas. temp. Lee 54) (4).

(c). A appoints several persons executors of his will and codicils, and his nephew residuary legatee, and in another codicil are these words:—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils, signed of different dates." The nephew is appointed an executor by implication. (See *Grant v. Leslie*, 3 Phill. 116) (5).

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 7. <i>Co-existence of different kinds of executors in the same will or probate.</i> |
| § 2. <i>How appointment made.</i> | § 8. <i>Coadjutors or overseers.</i> |
| § 3. <i>Appointment express or by necessary implication.</i> | § 9. <i>The Court of probate how far a Court of construction for purposes of this section.</i> |
| § 4. <i>"By necessary implication."</i> | § 10. <i>Ambiguity in the description of executors.</i> |
| § 5. <i>Appointment absolute or qualified.</i> | § 11. <i>Executor's remuneration.</i> |
| § 5a. <i>Executor for property not specified in the will.*</i> | § 11a. <i>Executor's discharge.</i> |
| § 6. <i>Instituted and substituted executors.</i> | |

(1) Wms. 242; 164 10th Ed.

(2) 14 L. of Eng. 139.

(3) Walker and Elg. 9.

(4) Wms. 246; Walker & Elg. 7.

(5) Wms. 244.

§ 1. The section.—In *Hāmabdi v. Ramanji Nasarwanji* [7 B. H. C. R. A. C. J. 64], Sir Richard Couch C. J. said:—"Section 182 of Act X of 1865 (which corresponds to this section) appears to be compiled almost *verbatim* from cases collected in the work of Mr. Williams on executors, as are many more sections of the Act formed upon cases decided in the English Courts."

§ 2. How appointment made.—"An executor may be appointed solely, or in conjunction with others;" and the appointment may be by one or more testamentary papers, and there may be one or more executors for the same will (1). The appointment must be contained in the body of the will [*In re Woods*, (1868) L. R. 1 P. & D. 546] (2). It is not

Testator may delegate his power of appointing.

necessary that the testator should himself appoint his executors; he may delegate the power of appointing executors to some third person [*Moosa Haji v. Haji Abdul*, 5 Bom. L. R. 639; *In re Cringan*, 1 Hagg. 548; *Jackson v. Paulet*, 2 Rob. 345] (3), and the person to whom such power is given may appoint himself [*In re Ryder* (1861) 2 Sw. & Tr. 127] (4). Similarly, a testator may authorize the survivor or survivors of his executors to appoint another or others in order to keep their original number intact. Thus where a testator appointed A. and B. executors, and in case of the death of either of them, empowered the survivor to appoint another, so that there should continue to be two executors, it was held, the arrangement was good, and probate was granted to C. who had been appointed by B. after the death of A. [*In re Deichman*, 3 Curt. 123; followed in *Moosa Haji v. Haji Abdul*, *supra*] (5).

Mr. Justice Henderson seems to doubt whether executors appointed by persons other than the testator himself, are entitled to probate according to the Indian Laws (6). But this doubt has been removed by *Moosa Haji v. Haji Abdul* [*supra*] in which Sir L. Jenkins, C. J. of the Bombay High Court held, that there being nothing in the Probate and Administration Act imposing upon a testator an obligation himself to name his executor, nor anything prohibiting him from appointing as his executor such person as some one selected by him may name for that purpose, an executor appointed by the survivor of two executors appointed by the testator himself, under a power of appointment contained in his will, is good and valid. Thus, following the practice in England, executors may be appointed by persons other than the testator himself; or in other words, a testator may delegate the power of appointing executors to some third person.

§ 3. Appointment express or by necessary implication.—Executors are either (a) *executors nominate* or such as are appointed in express terms, or (b) *executors according to the tenor*, i. e., such as are appointed by inference from the contents of a testamentary document. In the latter case, the appointment is termed *constructive*, or, as under this section, "by necessary implication." An executor appointed "by necessary implication" is usually called *executor according to the tenor* (7).

(1) Wms. 109, 249, Theob. 72, 3rd Edn., Bro. P. P. 111, 143.

(2) Walker and Elg. 2.

(3) Wms. 249, 251, Bro. P. P. 144, Elg. 3, Tr. and Coote 43; Theob. 72, 3rd Edn. 84, 5th Edn. Powl. and Oak, 97, 4th Ed.

(4) Wms. 251.

(5) Walker and Elg. 5.

(6) Hend. 317, 318.

(7) Wms. 243; Bro. P. P. 138, Walker and Elg. 2; Tr. and Coote 42; Theob. 73, 3rd Edn.; 85, 5th Edn.

It may be observed that, appointment of executors by necessary implication is not to be favoured by the Court, and the language of the will is not to be strained for this purpose, but that in doubtful cases letters of administration with the will annexed ought to be granted [*Ameerchand v. Mohanund Bibi*, 6 C. L. J. 453].

§ 4. “By necessary implication.”—In order to constitute one an executor according to the tenor, it must appear, on a reasonable construction of the will, that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in such will and administer the estate generally [*Ameerchand v. Mohanund Bibi*, *supra*, following *In re Wilkinson*, (1892) P. 227; *In re Adamson*, L. R. 3 P. & D. 253; *Re R. Brown* (1910) 54 Sol. J. 478. See *Re Russell* (1892) P. 380, where the testator appointed one to carry out his will and for the due execution of his will, and it was held that such a one was executor according to the tenor] (1). In other words, there must be words importing a general power to receive and pay what is due to and from the estate of the deceased [*In re Jones*, 2 Sw. & Tr. 155] (2). Accordingly, although no executor be expressly nominated in the will by the word *executor*, yet “if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors” [*Hamabai v. Bamanji Nasarvanji*, 7 B. H. C. R. A. C. J. 64. The extract is from Swinburne]. The expression “Necessary implication,” has been defined by Lord Eldon in *Williamson v. Adam* (1 Ves. and B 466) to mean, “not natural necessity, but so strong a possibility of intention, that a contrary intention cannot be supposed” (3), as where the direction shows an intention that for the general purpose of administration the executor is appointed [*Kuppayammal v. Ammani Ammal* L. R. 22 M., 345].

Thus, if certain persons are directed to pay debts, funeral expenses, and

Illustrative cases, English.

expenses of probate, they are executors according to the tenor [*In re Fry*, 1 Hag. 80] (4); so, where one is simply appointed to pay all the just debts of the testator [*Re Cook* (1902) P. 114; see *Re Wilkinson supra*; *Re Way* (1901) P. 345]; but not if they are directed to pay them out of a particular fund, even though the testator declare that that fund is all the property he possesses [*In re Toomy* (1864) 3 Sw. & Tr. 562]. So a mere direction to a legatee, to pay the funeral expenses, out of his legacy, will not constitute him executor according to the tenor [*In re Smith*, 3 Sw. & Tr. 562; 34 L. J. P. and M. 15] (6). Where a testatrix appointed A. her executrix, “only requesting” that B. and C. would act for or with A, it was held that B, who alone survived the testatrix, was executrix according to the tenor [*In re Brown*, 25 W. R. Eng. 431; L. R. 2 P. & D. 110] (7). So where a testator appointed A. and B. without saying to what office, and afterwards bequeathed legacies “to each of my executors,” and gave to his “said executors” the residue of his property,

(1) Bro. P. P. 145; Walker and Elg 6; Theob 73. 3rd Edn.; 85, 5th Edn.

(2) Elg. 6; Bro. P. P. 147; Wms. 246.

(3) Hend. 318; Undrhill. 28.

(4) Wms. 244; Bro. P. P. 145; Walker and Elg. 6.

(5) Elg. 6; Bro. P. P. 146; Haynes L. C. 354; Wms. 245 (P).

(6) Haynes. L. C. 334; Bro. P. P. 146.

(7) Eng. 7; Bro. P. P. 146; Haynes L. C. 354; Tr. and Coote 42; Theob. 73, 3rd Edn.; 85, 5th Edn.

it was held, A. and B. were appointed executors by implication [*In re Bradley*, L. R. 8 P. & D. 215] (1).

Where M. duly executed a testamentary paper in the form of a letter, beginning with the words—"My dear Eliza," and containing full information as to the amount of her property, with full directions as to how she wished it to be disposed of, and concluding with these words—"I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much," the Court decreed probate of the paper to Eliza, as executrix according to the tenor [*In re Manly*, (1862) 3 Sw. & Tr. 56] (2).

So where a testator said, by his will, that none should have any dealing with his goods except J. S., the latter was held to be executor by necessary implication [*Brightman v. Keighley*, 1 Cro. Eliz. 43] (3).

"It is commonly understood * * that whenever a will contains a direction to pay debts, but no person is nominated to pay them, and after or before this direction all the personal estate is bequeathed to a person by name, that person is held to be the executor according to the tenor of the will" (4).

A trustee named in a will is not necessarily an executor nor an executor necessarily a trustee [*Barada Prashed Banerjee v. Gajendra Nath Banerjee*, 13 C. W. N. 557; 9 C. L. J. 383]. "The true position, powers, and duties of an executor are essentially different from those of a trustee." [*Hara Coomar Sirkar v. Doorgumoni Dasi*, I. L. R. 21 C., 195, at 199] (5). There are certain duties which specially appertain to the office of an executor: such duties are implied in the general power to receive and pay what is due to and from the estate of the deceased, which properly constitute that office (6). The rule seems to be that, "unless the Court can gather from the words of a will that a person named a trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor. In other words, if a person be appointed trustee by a will, and the duties created thereby are such as would properly devolve upon a trustee, rather than upon an executor, such an appointment will not constitute him an executor according to the tenor" [see *Re Wilkinson*, (1892) P. 227; *Re Way*, (1901) P. 345; *Re Shaw*, (1895) 73 L. T. 192; *Re Nussey* (1898) 78 L. T. 169; *In the Estate of Mackenzie*, (1909) P. 305. See also *Re Mackay*, (1906) 1 Ch. 25]. Thus where the whole personal property is left to a trustee on trust for a specific purpose, and no executor is named in the will, such trustee is not an executor. So a person merely named as trustee without any duty being assigned to him, or any bequest to him, is not an executor according to the tenor [*Re Jones*, 2 Sw. & Tr. 155; *Re Kirby*, (1902) P. 188]. Nor trustees to whom the residue only is given on trust to pay debts, are such executors (*In re Jones*, *supra*; *In re Punchard*, L. R. 2 P. & D. 369; 17 W. R. No. of Eng. Ca. 42; *In re Lowery*, L. R. 3 P. & D. 157; *In re Toomy*, 3 Sw. & Tr. 562] (7).

(1) Theob. 73, 3rd Edn.; 85, 5th Edn.

(2) Haynes L. C. 354; Walker and Eng. 7; Bro. P. P. 146.

(3) Wms. 247; Walker and Eng. 6.

(4) Tr. and Coote 42 F. n.

(5) As to the distinction between the office of trustee and executor, see *Moss v. Burdwell*, 3 Sw. and Tr. 187.

(6) Wms. 244-46.

(7) Wms. 244, n (S); Bro. P. P. 146; Elg. 6; Tr. and Coote 42; Theob. 73, 3rd Edn.

Where trustees not held executors.—A testator provided as follows :—“I appoint as my sole heir my son Ranchhod, who is two years old, and therefore, I appoint three trustees * * * to administer my property until my son attains the age of majority. The trustees have full right to obtain possession of any property and to manage it as hereinafter mentioned.” Then the testator directed the trustees, to perform ceremonies and spend money in charity (giving a list of the charities), to pay maintenance allowance and annuities to his wives, sister and others according to the provisions of his will ; and further, to pay suitable sums for the marriage expenses of his son and for his education, giving them authority “to sell any portion of my property and to purchase new property if necessary.” The testator concluded by giving directions to the trustees “to make over all my property to my son on his attaining the age of 21 years” with certain provisions as to what were to be done if that son died childless. It was held, the trustees were not executors [*Harilal Babuji v. Bai Mani*, 29 B., 351 ; 7 Bom. L. R. 255] (a).

Where subject to the payment of certain annuities, the testator left his estate absolutely and entirely to his widow and appointed her and two others trustees [*Re Samuel Clarke Kennedy* (unreported)], or where the testator directed four persons to take charge of his property and with the income conduct the daily Poojah “from sons to grandsons and so on in succession,” and “in the manner I conducted them” [*Appacooty Mudali v. Muthukumarappa Mudali*, 30 M., 191 ; 16 M. L. J. 558], it was held, that neither of these dispositions constituted the above mentioned trustees or the four persons executors according to the tenor [*Re Punchard* and *Re Lowry supra*, followed].

Where trustees held executors.—But where a testator by his will directed his debts and testamentary expenses to be paid, and then gave all his personal estate to certain persons in trust to convert into money and receive it in such a manner as they should think proper, and to divide the proceeds amongst his children, it was held that the trustees were executors according to the tenor [*In re Baylis*, L. R. 1 P. & D. 21] (1). So where A. appointed B. and C. trustees to dispose of his effects as they thought fit, and to receive his life assurance for the benefit of his two sons, it was held that they were executors according to the tenor [*In re Gale*, 18 L. T. 696 ; 16 W. R. Eng. 942 ; *In re Bell*, L. R. 4 P. & D. 85] (2). So where a testator, by a codicil to his will appointed his wife Parvatibai to be his sole executrix and directed that she should carry on all his affairs, distribute certain moneys annually and defray certain *sadavarat* expenses in Cutch, and then provided as follows :—“In case of the death of my wife Parvatibai, the said affairs and distribution of money mentioned above to be paid by my second wife, Bai Mithibai.” It was held that Mithibai was entitled to probate being executrix according to the tenor of the will [*Mithibai v. Canji Kheraj*, I. L. R. 26 B., 571].

(a) If may be observed that in this case, the directions given by the testator have no reference whatever to the rights or liabilities of the testator which he enjoyed or incurred during his lifetime but failed to completely enforce or discharge before his death. The primary duty of an executor, or what specially appertains to the office of an executor, consists in the payment or collection of debts due from or to the estate of the deceased. No such duty is necessarily imposed upon a trustee : herein lies the chief distinction between an executor and a trustee. [See *Ameerchand v. Mohanund Bibi*, 6 C. L. J. 453].

(1) Theob. 73, 3rd Edn. ; 85, 5th Edn.

(2) Bro. P. P. 146 ; Walker and Elg. 6.

But where the testator gave his property to his son and grandson, postponing the division thereof until after the death of his widow, and directed them to pay Government revenue payable in respect of his dwelling house, to maintain his widow, to enable her, if she should desire it, to perform *broto*, or acts of religious devotion, and, according to the best of his means, to perform his *Sradh* and other rites, and the *Sradh* of the widow after her death, it was held that the son and grandson were not executors according to the tenor [*In re Prawn Krishna Dass*, decided 24th June 1885, by Pigot J.] (1).

Where the son of the testator, though not expressly appointed an executor, was directed to receive and pay the testator's debts and get in and distribute his personal estate, it was held that the son was an executor by implication [*In re Monohur Mookerjee*, (1880) I. L. R. 5 C., 756; 6 C. L. R. 228; *In re Baylis* (*supra*) followed]. But where the words of the will were, "I give, devise, and bequeath all my estate, moveable and immovable to my wife for her absolute use and benefit," it was held by Paul, J., that the legatee, the wife, was entitled to letters of administration as well as probate, the matter falling within the principle of the said case of *In re Baylis* [*In re Radhika Mohan Sett*, (1871) 7 B. L. R. 563. But see *In re Shoshee Bhusan Bannerjee*, (1872) I. L. R. 89 C., 582]. In *Mun Mohun Ghosal v. Pares Nath Roy* (22 W. R. 174), a sole residuary legatee was held to be entitled to probate as an executor by implication. In this case the question turned upon the construction of section 187, Act X, 1865, the contention being that the legatee, the plaintiff Mun Mohun Ghosal, not being an executor appointed by the testator, was not required by that section to take out probate to entitle him to enforce his claim under the will.* In *Sheshamma v. Chennappa* [I. L. R. 20 M., 467 (1897)], the will provided that the plaintiff should take care of the property during the minority of his son who was to be adopted to the testator and imposed certain other duties not specifically the duties of an executor, and it was held that he (plaintiff) was not an executor according to the tenor. So mere direction to pay certain debts out of certain property, is not sufficient to constitute executor by necessary implication [*Kuppayammal v. Ammani Ammal*, I. L. R. 22 M., 345]. Nor do words such as, "P. & M. * * * shall remain trustees, that is, guardians and next friends," constitute one an executor either expressly or by implication [*Gopal Dass Agarwalla v. Budreedas Sureka*, I. L. R. 33 C., 657; 10 C. W. N. 662]. But where a testator by his will appointed his wife, H., guardian of his infant children "in order that of all his property she should carry on the management (until the youngest son should attain the age of 22 years), and in the testator's name the management of his firm," it was held, that H. was an executrix by implication and entitled to probate [*Hamabai v. Bamanji Nasarvanji*, 7 B. H. C. R. A. C. J. 61]. So, where the testator empowered his two wives to make patni settlement of his immoveable property and gave full authority to three other persons to do what they thought fit as regards the performance of the rites and ceremonies, and the debts and dues, it was held that these three persons were executors according to the tenor [*Promodebala Debi v. Krishna Sundary Debi*, 1 C. L. J. 301].

Where property is dedicated to the *sheba* of an Idol, and a *shebait* is appointed by will to carry on the *sheba* and the general management of the property, with power "to receive and pay what is due to and from the estate of the deceased,"

Where Shebait, an Executor.

* See sec. 187 (S), *ante*.

(1) Do. *Ibid.* 307.

such *shebait* being a trustee is also an executor according to the tenor, and is entitled to probate [see *Ranajit Singh v. Jagannath Prosad Gupta*, 1 I. L. R. 12 C., 375; *Brojo Chunder Goswami v. Raj Kumar Roy*, 6 C. W. N. 310; *In re Hurro Lal Karforma : Ashootosh Paramanick v. Draba Moyee Dasi*, (unreported); *Kripamoyee Dasi v. Mohim Chandra Dutt*, 10 C. W. N. 232]. (1) (a).

A universal legatee as such is not an executor according to the tenor, and though empowered to prove the will, is not entitled to probate [*In re Oliphant* (1860) 1 Sw. & Tr. 525; followed in *In re Vittal Doss*, 1 I. L. R. 15 M., 360; *Re Pryse*, (1904) P. 301; see also *In re Shoshee Bhusan Bannerjee*, *supra*] (2). But where the testator not only constituted his niece his universal legatee, but directed her also to perform the duties which specially appertain to the office of an executor, such legatee was held, on the authority of *In re Panchrad* (2 P. & D. 369) and *In re Adamson* (3 P. & D. 253), to be an executor according to the tenor and entitled to probate [*In re Courjon*, (1897) I. L. R. 25 C., 65]. Where the language of the will is not clear enough to make the applicant an executor by implication, the mere fact of the will being addressed to her does not entitle her to obtain probate as an executrix according to the tenor [*In re Amrita Lal Mookerjee*, 5 C. W. N. xcviij].

It would appear from the foregoing that although a general power to receive and pay what is due to and from the estate of the deceased, is essential to constitute the office of an executor, express direction to pay debts is not indispensable. Thus a person appointed to carry out the intentions of the will has been held to be an executor by "necessary implication," or according to the tenor [*Re Mc. Kane* (1887), 21 I. L. R. Ir. 1; *Re Allam*, 66 L. T. 382].

§ 5. Appointment absolute or qualified.—The appointment of an executor may be *absolute*, as when it extends over the whole of the testator's properties and is without any limitation in point of time; (b) or it may be *qualified*, as when it is limited "as to the time or place wherein, or the subject matter whereon, the office is to be exercised" (3). In the first case the grant is *general*, and in the second, *limited*. Executors appointed for limited purposes, *i. e.*, qualified executors, are called also special executors (4).

The appointment of executors may be qualified by limitations—(i) in point of time; (ii) in point of place; (iii) as to the subject-matter; and (iv) by the imposition of conditions.

(a) See *Kalicharan Thaker v. Annada Kant Bhattacharya* [(1910) 15 C. W. N. 1], which substantially resembles *Brojo Chunder Raj Kumar* (*supra*), where the Court below might have granted probate, but instead of that granted letters of administration with the will annexed, holding the *shebait* not an executor by implication. In appeal Sir L. Jenkins, C. J. seeing that the estate was very small and letters had actually issued, did not interfere with that order.

(b) Such an executor is called a general executor, 14 L. of Eng. 138.

(1) Suit No. 7 of 1897, decided 14th Dec. 1898.

(2) Bro. P. P. 147; Tr. and Coote 42; Wms. 244; Haynes. L. C. 355; Walker and Elg. 7.

(3) Bro. P. P. 140-41; Wms. 253; Walker and Elg. 7, 8.

(4) Theob. 72, 3rd Edn.; 84, 5th Edn.

(i) **Examples of limitations in point of time.**—A testator “may, if he will, make one man his executor for one year, and another man his executor for another year; or one man his executor until such a time, and then another his executor: as one may make A. and B. his executors, and that B. shall not meddle during the life of A.” (1): or a testator “may appoint a person to be his executor for a particular period of time only, as during five years next after his decease, or during the minority of his son, or the widowhood of his wife or until the death or marriage of his son” (2).

Where a testator authorising his widow to adopt a son, directs his executor to hand over his properties to such adopted son on his attaining majority and provides that “such adopted son shall carry out the directions as hereinbefore contained,” it must be understood that the appointment of the executor is a qualified one being limited in point of time, that is, till the arrival of the son at majority [*Rajendra Chandra Mitra v. Manick Lal Ghatak* (1911) 8 A. L. J. 1063].

(ii) **Examples of limitations in point of place.**—“And a man may make one man executor for one part of his estate, and another man his executor for the other part of his estate” (3). That is to say, he may make A. his executor for his goods in Calcutta, B for those in Bombay, and so on (4). (See *In re gladstone*, I. L. R. 1 C., 168. *Re Cohen*, (1902) 1 Ch. 187].

(iii) **Examples of limitations as to the subject-matter.**—The testator may appoint one executor for general, and another for limited purposes [*Lynch v. Bellow* (1820) 3 Phillim. 424], e.g., for his business or property situated in a particular country [*Re Parker's Trusts* (1894) 1 Ch. 707; *Re Cohen, supra*]; or he may make one for his moveable and another for his immoveable properties; and a third for his household purposes, or for purposes of conducting law suits only (4).

Where a testator appoints a general executor and a special executor, it seems, the general executor may act in supersession of the authority of the special executor [see *Re Cohen*, (1902) 1 Ch. 187].

(iv) **Appointment qualified by the imposition of conditions, or conditional appointment.**—The appointment may be conditional the condition being, as usual, precedent or subsequent, as where the appointment is made on condition that the person named shall give security to pay the legacies or on the happening of a certain event [*Re Langford* (1867) L. R. 1 P. and D. 458], and in general to perform the will, before he acts as executor (5), or on condition of his proving the will within three months after his death [*Re Wilnot*, 1 Curt. 1]. “And lastly, a man may make another his executor upon condition, viz. so as to give bond to such and such men to perform his will, or the like” (6).

In short, a testator may, if he pleases, qualify the appointment of his executors in a large variety of ways (7).

(1) Shep. T. 460.

(2) Wms. 254; 8th Ed.; 175, 176, 10th Ed. Walker and Elg. 8.

(3) Shep. T. 460.

(4) Wms. 255-56 8th Edn; 176, 177, 10th Ed; Walker and Elg. 8.

(5) Wms. 258, 8th Ed.; 178, 10th Ed.; Walker and Elg. 8

(6) Shep. T. 460.

(7) Walker and Elg. 8.

§ 5a. **Executor for property not specified in the will :—**Such an executor, being precluded from dealing with the property disposed of by the will, is not entitled to probate, but may obtain letters of administration with the will annexed [*Re Wakeham* (1872) L. R. 2 P. & D. 395].

§ 6. **Instituted and substituted executors.**—A testator may also make an alternative appointment of executors; that is to say, he may appoint several persons as executors in several degrees. As, where he appoints A. sole executor, or in the event of a contingency—such as A's death, absence or inability to act—then B; and in the event of B's inability to act, C; and so on [*Re Lighton* (Sir J.) (1828) 1 Hagg. Ecc. 235; *Re Johnson* (1858) 1 Sw. and Tr. 17; *Re Foster* (1871) L. R. 2 P. & D. 304]. “In this case A. is said to be *instituted* executor in the first degree; B is said to be substituted executor in the second degree; C to be substituted in the third degree; and so on” (1). [See *Hurmusjee Navroji v. Bai Dhanbaiji*, 1 L. R. 12 B., 164; see also *In re Arbib* (1891) 1 Ch. 601].

In every case of alternative appointment, “the court will look to see whether the contingency has taken place or not, and the right of the *substituted* executor will not be affected by the mere fact that the *instituted* executor has already proved the will.” Thus where a testator appointed his wife sole executrix, and in default of her, J. K. and R. F. were to be executors of his will; and the wife took out probate, and died leaving part of her husband's estate unadministered, the Court granted probate to J. K. and R. F., there being by the wife's death a default, by reason of which a substitution took effect (*In re Foster*, 17 W. R. No. of Eng. ca. 11; L. R. 2 P. and D. 304). Similarly, the right of the substituted executor will not be affected by the fact that the instituted executor has predeceased the testator [*In re Betts*, 30 L. J. P. & M. 167] (2). In all such cases, however, the question is mainly one of *intention* of the testator; so that a *substituted* executor will be admitted to the office, “if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in testator's lifetime, or afterwards” [*Mithibai v. Canji Kheraj*, 1 L. R. 26 B., 571; *In re Lighton*, 1 Hagg. 253; *In re Johnson*, 1 Sw. and Tr. 17] (3). Accordingly the word ‘*absence*’ has been interpreted to include inability to act [*In re Langford*, L. R. 1 P. & D. 458] (4), and ‘*inability to act*’ to mean inability arising from death. [*In re Betts*, *supra*].

Except where the instituted executor is absent or dead, it seems to be the general rule, that the substituted executor cannot propound the will until the instituted one has been cited to accept or refuse probate [*Smith v. Crofts*, 2 Cas. temp. Lee 557] (5).

§ 7. **Coexistence of different kinds of executors in the same will or probate.**—Appointment of both kinds may coexist in the same will; therefore an executor according to the tenor may be admitted to probate jointly with an executor expressly nominated [see *Re Brown* (1877) 2 P. D. 110; *Re Wright* (1908) 25 T. L. R. 15. See also *illus. sec. 9 (P) post*]. Similarly, where an executor is expressly nominated for general purposes, another person in

(1) Bro. P. P. 144; Wms. 249-250; Tr. and Coote 64; Walker and Elg. 4. 5.

(2) Bro. P. P. 144; Tr. and Coote 64; Walker and Elg. 5.

(3) Wms. 250.

(4) Walker and Elg. 5.

(5) Wms. 250. n (m).

the same will, may be held to be an executor according to the tenor, for limited purposes [*Lynch v. Bellow*, 3 Phill. 424]. So, where a person had been expressly appointed executor for a limited purpose *in a will* it was held that he was appointed general executor by implication in a *codicil* [*In re Aird*, 1 Hagg. 336] (1).

§ 8. Coadjutors or Overseers.—It is not unfrequently that testators are found to nominate persons to assist and advise the executors appointed by them in the discharge of their duties. Such persons are termed *coadjutors or overseers*.
Coadjutors not executors. “There is a great distinction between the office of a coadjutor or overseer, and that of an executor. The coadjutor, or overseer, has no power to administer or intermeddle otherwise than to counsel, persuade and advise.” The appointment of a coadjutor is intended to remedy “negligence or miscarrying in the executors,” and this being so, it is within his competency to bring such “negligence or miscarrying” to the notice of the Court, whenever he should fail to remedy the same [see *Brajo Chunder Goswami v. Raj Kumar Roy*, 6 C. W. N. 310 *Sayaji Nagooji v. Muthumabai*, 6 Bom. L. R. 78] (2).

Where a man makes A. and B. his executors, and says, “I will that I. S. shall be a coadjutor, or helper to A. and B.,” or “I will that I. S. shall be surveyor or supervisor of my will,” I. S. is not made an executor with A. and B., but he is made a coadjutor or overseer only (3). But where, the testator named his wife his executrix, and directed A. B. to assist her, it was held that A. B. “might be executor according to the tenor.” [*Powell v. Stratford*, 3 Phillim. Ecc. Rep. 118] (4). Where A. was appointed executor and was directed first to take possession of all the property, and then to act with the consent of B., it was held that B. was not an executor by implication [*Judoonath Sundyal v. Kunnuckmonee Dabia*, Cal. S. D. A. decision, 27th May, 1850] (5).

There are cases in which a person is nominated by the testator with his functions clearly defined, but who is neither an executor nor a coadjutor or overseer [*Eastern Mortgage & Agency Co. v. Revati Kumar Roy*, 3 C. L. J. 260]. Where for instance, the testator directed that “if it become necessary to borrow more than 1000 rupees or to alienate any property of a greater value or to grant any pottah for any greater amount, then it might be done with the consent of N.,” it was held, that N. “was neither an executor by implication, nor a mere overseer, but was a person whose assent the testator intended should be obtained to validate certain classes of transactions, as the testator had confidence in his judgment and integrity.”

The distinction between the office of an executor and a coadjutor or an overseer seems, therefore to consist in this: An executor has power to administer the estate of the deceased, but an overseer has no such power his only function being, as if, “to hold the candle” by his counsel and advice; so that, if he has any power to administer he is not an overseer but an executor, although

Executor and Overseer, distinction between.

(1) Wms. 248-49; Walker and Elg. 7.

(2) Wms. 169, 13th Edn.

(3) Shep. T. 461.

(4) Wms. 248.

(5) 1 Marl. Dig. 166.

not so called by the testator. Thus if a A. be made an executor and the testator in his will expresses that B. shall also administer with him, and in aid of him, then B. is also to be regarded an executor, and may prove the will alone, as executor, if A. refuse (1). The act of giving consent to any transaction is not administering; nor is such an act "holding the candle" [*Eastern Mortgage & Agency Co. v. Rabati Kumar Roy, supra*].

§ 9. The Court of probate how far a Court of construction for purposes of this section.—In England, the Court of probate is not a Court of construction (2) and such is also the case in this country. The jurisdiction of the Court of probate being confined to the *factum of the will*, it follows that, "if there be an ambiguity upon the *factum* of the instrument" (see next para), that is also a matter which must come within the legitimate jurisdiction of that Court. Thus questions regarding the intentions of the deceased as to what shall operate as, and compose the testator's will, or as to whether a particular person is an executor according to the tenor, and such other incidental matters as are necessary for the determination of the representative title of the applicant, or in other words, "all matters of ambiguity upon the *factum* of the instrument," are to be inquired into and determined by the Court of probate from all the circumstances of the case and upon a true construction of the will. [*Arunmoyi Dasi v. Mohendra Nath Wadadar*, (1893), L. L. R. 20 C., 888; *Robertson v. Smith*, L. R. 2 P. & D. 43; *In re English*, 3. Sw. & Tr. 586; *Chichester v. Quatrefoiges*, (1895)]. But the Court of probate is not to act as a Court of construction except in cases where it is absolutely necessary to determine the rights of the litigant parties (see observations of Sir C. Cresswell, in *Warren v. Kelson*, 28 L. J. Ch. 123). Such determination, however, wherever it occurs, is subject to a subsequent interpretation by the proper Court of construction (*Arunmoyi Dasi v. Mohendra Nath Wadadar, supra*.)

"By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it. As whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge; whether a codicil was meant to republish a former or a subsequent will; or whether a codicil purporting on its face to confirm other codicils of dates subsequent to that of its own execution, was correctly dated"; these are all matters of ambiguity upon the *factum* of the instrument" (3).

The Probate Court may also construe the will in order to ascertain whether by the words *trustee* or *administrator* the testator intended to mean an executor and *vice versa* [*Moosa Haji v. Haji Abdul*, 5 Bom. L. R. 639.]

§ 10. Ambiguity in the description or appointment of Executors.—In case of ambiguity in the description of executors, external evidence has been held to be admissible to ascertain the person actually intended. The rule seems to be, as laid down in *Grant v. Grant* [(1869) L. R. 2. P. & D. 8], that, "where a word is used in a will as part of a description of a person specified by name, and is applicable to persons so named in an ordinary popular sense, as well as, in a strict and primary sense, an ambiguity is raised, and the

(1) Wms. 170, 10th Ed.

(2) Wms. 298.

(3) Wms. 257 10th Ed.

Court may receive evidence of the circumstances in which the testator was placed when he executed his will, and of the sense in which he was accustomed to use the word, in order to ascertain the person indicated" [see *Re Brake* (1881), 6 P. D. 217] (1). Thus in *Charter v. Charter* (1874) [L. R. 7 H. L. 364; S. C. 17 W. R. No. of Eng. Ca. 11], parol evidence was admitted to explain a latent ambiguity in a will which appointed testator's son, by name Foster Charter, to be his executor, when the names of his two sons were William Foster Charter and Charles Charter. [See *Re chappell*, (1894) P. 98; *Re cooper*, (1899) P. 193]. See section 67 (S) *ante*.

A testator appointed as one of his executors "*Robert Taylor of Warmley Hill* in the parish of Britton, bootmaker." There was no Robert Taylor there, but there was a James Alfred Taylor boot-maker living there, and it appeared that Robert Briton Taylor, his brother, also a boot-maker, lived at Hanham in the same parish. It was held that extrinsic evidence might be received to show that "James Alfred Taylor of Warmley Hill" was a friend of the testator, and that the testator had little acquaintance with "Robert Britton Taylor of Hanham." The Court ordered probate to issue to James Alfred Taylor of Warmley Hill [*Re Chappell* (1894) p. 98]. It was also held that the declarations of the testator were not admissible. (*Ibid.*)

The Court will not receive evidence of the actual intention of the testator [*Re Chappell, supra*] except where the description is equally applicable in all its parts to two or more persons [*Re Ashton* (1892 P. 83; *In the estate of Hubbard* (1905) P. 129; see *Charter v. Charter, supra*].

The ambiguity must be latent and real, and, where the name and description in the will apply to an actually existing person, no evidence will be received to show that some one else was in fact intended [*In the goods of Peel*, (1870) L. R. 2 P. & D. 64] (2). An appointment of an executor may be void for uncertainty [*In re Baylis* (1862) 2 Sw. & Tr. 613; *In re Blackwell* (1877) L. R. 2 P. & D. 72] (3).

§ 11. Executor's remuneration.—On grounds of public policy, the office of an executor should be voluntary and gratuitous. Hence, as a general rule, "an executor or administrator shall have no allowance, at law or in equity, for personal trouble or loss of time in the execution of his duties." The principle underlying this rule is, "that bargains which secure remuneration to the executor out of the testator's estate, have a tendency to dissipate the property," by offering "an inducement for him to neglect his duties and to prolong the administration instead of acting with diligence and care" [*Narayan Coomari Debi v. Shajani Kanta Chatterjee*, (1894). I. L. R. 22 C. 14; *Robinson v. Pett*, 3 P. Wms. 249; *Scattergood Harrison*. Mosely 130; *Brocksopp v. Burnes*, 5 Madd. 90] (4). But this rule does not hold good in a case where the remuneration is agreed to be paid out of another's estate by a party having no interest under the will (*Narayan Coomari Debi v. Shajani Kanta Chatterjee, supra*). Nor where the executor being unable to collect the estate himself, employs an agent to do the same, in which case he is entitled to the expenses thereby incurred (*Bonithon v. Hockmare*, 1 Vern. 216; *Hopkinson v. Roe*, 1 Beav. 180) (5).

(1) Hayne's L. C. 355; Bro. P. P. 142; Wms. 1158, 1159; Theob. 202, 203, 3rd Edn.;

(2) Bro. P. P. 142; Walker and Elg. 3.

[247, 5th Edn.

(3) Bro. P. P. 141, 142; Wms. 252; Walker & Elg. 3.

(4) Wms. 1860; Walker & Elg. 285.

(5) Wms. 1867; Walker & Elg. 218, 283.

But it has been held by the Punjab Chief Court that the Probate Court in India is competent to award remuneration to an executor to whom no legacy has been left by the testator [*In re Sirdar Dyal Singh*, 40 Punj. Rec. 76 ; 6 Punj. L. R. 195].

Where a Muhamedan testator declared in his will that his executor should have power to charge a commission of three per cent. on the proceeds of the sale of his property, for which he had given directions in the will, it was held by the Privy Council that, although it was given by way of remuneration, such commission is a gratuitous bequest and nothing more than a legacy to the executor [*Aga Mahomed Jaffer Bindaneem v. Koolsom Beebee* (1897) 1 C. W. N. 449] (a).

In England, even a solicitor or attorney who is an executor, is not allowed payment of his bill of costs for any professional service he might himself render for the benefit of the estate (*New Jones*) (1). Perhaps this practice no longer prevails ; for, in *Gangabai v. Bhugwandas Valji* [L. R. 32 I. A. 142 ; 29 B., 530 ; 7 Bom. L. R. 854 ; 15 M. L. J. 271 ; 3 A. L. J. 68 ; 9 C. W. N. 769], Lord Davey is reported to have said that where a member of a firm of solicitors is appointed an executor, it is usual to allow him to charge for professional work done by him or his firm. But see *In re Chalender and Herington*, 11 C. W. N. ccviii. So agents in India of absent executors are not entitled to commission (*In re Cowie*, 1. L. R. 6 C. at 77 ; 7 C. L. R. at 26).

Although an executor or administrator is not entitled to any remuneration out of the estate, he is entitled to receive his costs "incurred for or in respect of any judicial proceeding" [sec. 102 (P)]. He is also entitled to a refund of such of his own money, or of money procured by him, as he has used for the purposes of the estate [*Krishna Rao Ramchandra v. Benabai* 1. L. R. 20 B., at 593.]

§ 11a. **Executor's discharge.**—See *infra* sec. 17 (P) § 1a.

Person to whom
probate cannot be
granted.

124. ^{8 (P)}
183 (s).—Probate cannot be granted
to any person who is a minor or is of un-
sound mind.

Note.—As to letters of administration the corresponding section is 13 (P), *post*.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Person "of unsound mind."*

§ 3. *"A minor."*

§ 4. *Persons capable of being executors.*

(a) See section 4, Sub-sec. (1), Act V of 1902, which provides that. "No private executor or administrator shall be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator General's Act, 1874."

(1) Cited in *Wms. Executors*, 1861.

§ 1. The section.—This is section 183 of the Indian Succession Act. The words “nor to a married woman without the consent of her husband.” which occur in that section have been omitted here; so that, probate can be granted under this Act to a married woman without the consent of her husband. The restriction is removed because “the imposition of such a condition would be inconsistent with the proprietary status accorded to married women among a large proportion of persons for whom the Act is intended, and would confer a power on the husband which would, in many cases, be likely to be abused” (1).

As to the power of a married woman to whom probate shall have been granted, see *post*, sec. 96 (P).

§ 2. “A minor.”—See definition, *ante*, p. 14. A minor may be appointed an executor [sec. 6 (P) *ante*.], but no probate can be granted to him : and, although letters of administration with the will annexed may be granted to the guardian of such minor, until he attains majority [sec. 31 (P) *post*.], “the property of the goods is in the infant executor;” that is, “all the property of the deceased person vests in him as such” [sec. 4 (P) *ante*.]. This may not appear to be consonant with the prevailing idea of property in this country and the functions of an executor; but nevertheless such is the fact, and for this reason: The rule of law embodied in this section is purely a rule of English law of personal property. According to that law in

Minor's eligibility to executorship. all matters in which the personal estate is concerned, an executor or administrator “represents the person of the testator, as the heir does that of his ancestor;” so that, so far as personality is concerned, an executor or administrator is, to all intents and purposes, the heir of the deceased (2) [sec. 4 (P), § 1 *ante*.]. Thus, the distinction between real and personal property having ceased to exist in this country, for purposes of representation, a minor is as much eligible to the office of an executor as an adult, in respect of all properties, real or personal.

§ 3. Person “of unsound mind.”—This includes idiots and lunatics who as already seen [sec. 6 (P) *ante* § 5] are, unlike the minors, incapable of being executors or administrators. This exclusion is attributable to the fact that “these disabilities render them not only incapable of executing the trust reposed on them, but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of the trust or not” (3). Idiots and lunatics under Hindu law, are regarded as disqualified persons, and are incapable of inheriting or holding any property or estate (4).

As to who are persons of unsound mind see sec. 46 (S), *ante*, and 33 (P), § 2, *post*. See also Acts XXXIV and XXXV of 1858.

§ 4. Persons capable of being executors.—See *supra*, sec. 6 (P), § 4. and sec. 183 (S), n.

But to be capable of being appointed an executor is not the same thing as being capable of taking a grant of probate.

(1) Report Select Committee.

(2) 2 Steph. 197.

(3) Wms. 242, 8th ed. ; 164, 10th ed. But see *Supra*, sec. 6 (P), § 5.

(4) J. Bhattacharja's H. Law, 349, 2nd Edn.

Grant of probate to several executors simultaneously or at different times.

125. 9 (P).—When several executors
184 (s) are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of B's will by express appointment, and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first and then to C, or to C first, then to A.

NOTES AND COMMENTARIES.

1. *Several executors.*
2. *"Simultaneously."*

- § 3. *"At different times."*
- § 4. *Several executors with distinct powers.*

§ 1. Several Executors.—If there be several executors they are all regarded in the light of an individual person (1). Accordingly, probate granted to one of such executors enures to the benefit of all and it is not necessary for all to prove together, but one may, even without notice to the others, prove the will. So that it follows that the acts of any one of them, in respect of the administration of the deceased's estate, are deemed to be the acts of all. See sec. 92 (P), *post*.

The several executors must be of the same degree, i. e., of equal position. An executor for life is not of the same degree as the executor substituted upon his decease (2).

One of several executors cannot dispute the title of the other to be joined in the probate, except when that other turns out to be an idiot or a lunatic (3).

§ 2. "Simultaneously."—Where probate is granted of two or more instruments as forming the last will of the testator, the usual practice is to include in the grant all the executors named in the several documents. Thus where a testator executed on the same day three testamentary documents, and by the first of such documents he disposed of some property in Canada and appointed certain executors; by the second disposed of his property in England and appointed certain other executors; and by the third which was substantially the same as the second, appointed no executors; probate was granted of the three documents as constituting together the last will of the deceased, to all the executors named in the first and second, simultaneously [*In re Nickolls*, 4Sw. & Tr. 40] (4).

(1) Wms. 249, 386, 8th ed.; 715, 10th ed.; Shep. Touch, 484; Tr. & Coote, 51-52.
 (2) Tr. and Coote 52
 (3) Coote 108.
 (4) Bro. P. P. 104.

§ 8. "At different times."—If after the grant of probate to one of several executors, another comes in, according to the **English Court Practice.** practice in the English Courts, "he also is to be sworn in the usual manner, and an engrossment of the original will is to be annexed to such probate in the same manner as the first; and in the second grant such first grant is to be recited. And so on, if there are more that comes in afterwards." The probate to the second executor is termed *double*, and that to the third *triple*, and so on (1). The second executor may come in during the lifetime or after the death of the first (2).

Where a testator made two wills, by the first of which he appointed his wife executrix, and by the second he appointed S executor, **Illustrative Cases.** but did not revoke his first will, probate of both wills was granted to the widow, the executrix, and leave was reserved to S to come in and prove afterwards (*In re Andrew*, 42 L. J., P. & M. 38; see also *In re Leese*, 2 Sw. & Tr. 442) (3). So, where there were four executors appointed by the same will, two having taken out probate, the right of the remaining two executors to come in and apply for probate was reserved [*In re Ardeshtir Rustomji Divecha*, 5 Bom. L. R. 131; 27 B., 281].

In *In re Krishnanand Swami* [1 A. L. J. 121], there were five executors of whom three at first took out probate, and then the fourth also did the same. But when the fifth executor, who was a debtor of the deceased's estate, applied for probate and denied his indebtedness, the Court held that grant of probate to the petitioner under such circumstances would not be to the interest of the estate, and rejected the petition under section 65 (P), *post*.

In *Pran Nath Ghose v. Judu Nath Bhattacharjee* (I. L. R. 20 A., 189), both the parties were executors appointed by the same will. The respondent, Jadu Nath Bhattacharjee took out probate in May 1896. In March 1897, the appellant, Pran Nath Ghose, applied for probate. The District Judge rejected the application. The High Court held, that the Lower Court was bound to grant probate to Pran Nath in the absence of legal incapacity, on the authority of this section [see *Hara Coomar Sircar v. Doorgamoni Dasi*, I. L. R. 21 C., 195; *Sardar Iswar Singh v. Messrs Harkishen Lal*, 8 Punj. W. R. 300].

§ 4. Several executors with distinct powers.—Where there are several executors appointed with distinct powers, as one for one part of the estate, and another for another, and there is but one will to be proved, one proving of it suffices. For instance, if B. is made executor for ten years, and afterwards C. is to be executor, and B. proves the will, and the ten years expire, C. may administer without any fresh grant of probate (4). But where the testator has limited the executors, as regards the situation of the property or otherwise, the Court may grant probate according to such limitations (5). Thus where a testator appointed A. B. his executor in England, and C. D. his executor in Portugal, the Court granted probate to the executors limited in the one case to the English, and in the other case to the Portuguese portions of the estate (*Velho v. Leite* 3 Sw. & Tr. 456) (6).

(1) Wms. 387; Bro. P. P. 216.

(2) Coote 50-51; Tr. and Coote 52.

(3) Bro. P. P. 143.

(4) Wm. 387; Walker. and Elg. 104.

(5) Wms. 387, 393; Walker. and Elg. 32.

(6) Bro. P. P. 143; Wms. 387, 590, 255 (p).

126. $\frac{10 \text{ (P)}}{185 \text{ (S)}}$

Separate probate of codicil discovered after grant of probate.

—If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

Procedure when different executors are appointed by the codicil.

If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.

NOTES AND COMMENTARIES.

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| 1. The section. | § 3. Separate probate of codicil. |
| 2. Instruments entitled to probate | § 4. "If different executors are appointed by the codicil." |

§ 1. The section.—This section is taken almost *verbatim* from Coote's "Common Form Practice" (1)

A similar rule is to be applied where letters of administration with the will annexed have been granted, and the title to the grant is affected by the codicil (2). See sec. 49 (P), *post*.

§ 2. Instruments entitled to probate.—This section proceeds on the assumption that a will and its codicil may be admitted to probate either separately or "together," and points out the circumstance under which the grant may be of a codicil separately, (para 1), or of a will and codicil together (para 2). Except what may be inferred from this assumption, there is no clear provision in this Act as to what instruments are entitled to probate, and how. The general rule which governs the admission of documents to probate has been noticed in section 6 (1) *ante*, § 1, with an enumeration of such instruments as are ordinarily held to be entitled to probate. It may be added, however, that, inasmuch as a will may be contained in one document, or it "may be of several sheets" or "consist of several independent papers (3)"; and inasmuch as, "it often happens that documents referred to in a testamentary paper become incorporated with, and form part of, such testamentary paper (4);" and further, as several wills may constitute "one sole will" [see *Rai Kisori Dasi v. Debendra Nath Sircar*, I. L. R. 15 C., 409; I. R. 15 I. A. 37], and a codicil is an instrument "forming an additional part of the will;"—broadly speaking, all testamentary papers *constituting* a will or *part* of a will, are entitled to probate.

(1) See Coote 53, 179; Tr. and Coote 54-55.

(2) Tr. & Coote. 55; but see *ib* 201.

(3) Lord Penzance in *Lemage v. Goodban*, L. R. 1 P. & D., at 62 (Bro. P. P. 104

(4) Bro. P. P. 108.

Thus, as a general rule, a will and its codicil are admitted to probate "together," and not separately (1). It is in exceptional cases, as this section provides, that a separate grant of probate of a codicil is made. The rule as to such separate grant seems to be based on the authority of *Langdon v. Rooke* (1 Notes of cases, 254) and *Wm. Beaton* (6 Notes of cases, 13) cited in Coote, and Tristram and Coote (2), from which it seems to have been borrowed.

Where there are several wills but they do not constitute "one sole will", separate probate may be granted [see *Mary Elizabeth Schenley*, 8 C. W. N. cclxxiv]. see *supra*, sec. 6 (P), § 1.

§ 3. Separate probate of codicil.—But, what this section provides does not seem to be the only circumstance under which a separate grant of a codicil may be made. There are other circumstances besides, which authorize such grants. Thus where a will is lost or destroyed, or is not forthcoming at the death of the testator, and a codicil is discovered after his death, a separate probate of such codicil may be granted, provided the Court is of opinion that "the testator intended it to be *perfectly independent of the will*, and to operate separately from it [*In re Greig*, L. R. 1 P. & D. 72; *Grimwood v. Cozens*, 2 Sw. & Tr. 368; *Black v. Jobling*, L. R. 1 P. & D. 685; *In re Savage*, L. R. 2 P. & D. 78] (3). In *Grimwood v. Cozens* (*supra*), Sir C. Cresswell said: "The question is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shown by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate *separately from the will*, otherwise it would be presumed that, as the will is destroyed, the codicil is also revoked." See sec. 57 (S), *ante*.

It will appear from the above that, separate grant of probate of a codicil only, may be made either when the will exists or when it does not exist, or is not forthcoming. This section provides for cases where the will exists: and as the only condition of such grant is, according to this section, the fact that the codicil "no way repeals the appointment of executors made by the will," it seems, it is quite independent of the question whether the codicil is intended to operate separately from the will.

§ 4. "If different executors are appointed by the codicil."—Thus where the testator by his will appointed two persons as executors, and in a codicil named his wife as his sole executrix, it was held that the appointment of executors by the *will* was revoked. In such cases, under clause second of this section, a new probate must be granted of the will and codicil together [see *In re Lowe*, 3 Sw. & Tr. 478] (4).

127. 11 (P).
186 (S).—When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

Accrual of representation to surviving executor.

See secs. 92 (P) & 93 (P) *post*.

(1) Coote 50; Tr. and Coote 51.
(3) Bro. P. P. 84, 102, 103.

(2) Coote 53; Tr. and Coote 53.
(4) Wms. 251.

- (1) See Shep. T. 484; Wms. 249, 950, 955; Walker & Elg. 20, 103, 165.
- (2) Shep. T. 465.
- (3) Walker & Elg. 20; Wms. 259, 478.
- (4) Wms. 478; Stokes 153.
- (5) Tr. and Coote 59 60; Coote 57; Wms. 258; Walker & Elg. 20.

the original testator [*De Souza v. The Secretary of State for India*, 12 B. L. R. 423]. It seems, however, that this does not preclude the

Derivative executor. appointment of a *derivative executor* (if he may be so called) under the express authority of the testator, as where a testator constituting a *shebait* his executor empowers him to appoint a *vakil* as his representative [see *Ranjit Singh v. Jaggannath Prosad Gupta*, (1885), I. L. R. 12 C., 375; *Parmanandas Jivandas v. Venayek Rao Wassudeo* (1878), I. L. R. 7 B., 19, P.C.]. In *Runchordas Vandrawandas v. Parvatibai* [I. L. R. 23 B., 725; I. R. 26 I. A. 71; 3 C. W. N. 621], the suit was originally instituted against *Vandrawandas Purshotamdas*, the sole surviving executor and trustee under the will. But such executor and trustee having died, he was allowed to be represented in appeal by his executors and executrix, *Runchordas* and others, who were evidently *derivative* executors and represented the original testator.

Derivative executor in India.

128. 12 (P).
188 (s). Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.
- Effect of probate.**

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 7. <i>Effect of probate before act XXI, 1870.</i> |
| § 2. <i>Effect of probate generally.</i> | § 8. <i>Probate where not conclusive.</i> |
| § 2a. <i>Effect of probate of a will under power.</i> | § 9. <i>Effect of probate on certificate.</i> |
| § 3. <i>Evidentiary value of probate.</i> | § 10. <i>Effect of order for probate and of issue of probate.</i> |
| § 3a. <i>Conclusiveness of probate.</i> | § 11. <i>"When granted."</i> |
| § 4. <i>"Renders valid...of the executor."</i> | § 12. <i>English and Indian probate, the same in effect.</i> |
| § 5. <i>Qualified nature of executor's representation.</i> | |
| § 6. <i>Validity of acts depend upon validity of probate.</i> | |

§ 1. **The section.**—This section seems to involve an apparent contradiction. The plain meaning of the words suggests that, until probate is granted the will is not established. In other words, the grant of probate only makes the will operative. But this cannot be the real meaning: for, section 187 (s) *ante*, having been excluded from this Act, a Mahomedan will may be probated according to the option of the executor; and this being so, such a will is fully valid before grant of probate, or even without any probate at all. The Bombay High Court, however, have reconciled this contradiction by treating this section as "a condensed statement of the English law which regards probate as the authenticated evidence of the will itself, from which the executor derives his title, and by virtue of which the property vests in him from the death of the testator" [*Shaik Moosa v. Shaik Essa*, 8 B., 241] (1). Their Lordships would,

(1) See the observations of Mr. Justice Strachey, in *In re Eschiel Abraham* (1896), I. L. R. 21 B., 139, at 149.

as Sir Roland K. Wilson holds (1), construe the words "establishes the will from the death of the testator" as meaning "is conclusive proof of the genuineness of the will, and of the date of the testator's death"; and would construe "renders valid, &c" as meaning "proves to have been valid *ab initio*". See *infra*, § 11, "when granted", and also sec. 59 (P).

§ 2. Effect of probate—generally.—The effect of probate of a Hindu will granted under this Act (Probate and Administration Act), "must be that which is given by the terms of the Act itself, neither more nor less". This being so, in delivering their Lordships' judgment in *Kurrutulain Bahadur v. Peara Saheb* [9 C. W. N. 938; 1 C. L. J. 594], Sir Arthur Wilson, referring to sections 4, 12, 59, 88 and 90 of that Act, thus summarises the general effect of probate which flows from them: "The title thus conferred upon every executor who has obtained probate, is obviously convenient as tending to facilitate the administration of the estate of the deceased, and the adjustment of the rights of all parties connected with it." That is to say, the effect of probate is nothing but what has relation to and perfects the representative title of the executor [see *Lalitmohan Das v. Radharaman Saha* (1911) 15 C. W. N. 1021, 1022—1028; 13 C. L. J. 547]. See sec. 59 (P), *infra*.

A probate has a two-fold office, which, besides granting the power of administration authenticates the will, and is evidence of the character of the executor [*Matson v. Swifts* 8 Beav. 368] (2). The Court of Probate declares the legal character (3) of executors, and confers upon them "the character of administrator;" but "it does not declare it" [Mr. Justice Trevelyan in *Girish Chandra Roy v. Broughton*, 1 L. R. 14 C., 861, at 875]. "The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will" [Mr. Justice Markby, in *Komulochun Dutt v. Nitrutton Mundle*, 1 L. R. 4 C., 360, at 362], and perfecting "the representative title of the executor to the property" of the deceased [Sir Richard Garth C. J., in *Behari Lal Sandyal v. Juggo Mohan Gossain*, 1 L. R. 4 C., 1]. The grant of probate does not prejudice the right of any person claiming any property covered by such grant [*Behari Lal Sandyal v. Juggo Mohan Gossain*, *supra*]. Hence it is no bar to any such person maintaining a suit for determining any question of inheritance or other title, or for the construction of the will [*Arunmoyi Dasi v. Mohendra Nath Wadadar* (1893), 1 L. R. 20 C., 888; *Jagunnath Prosad Gupta v. Ranjit Singh* (1897), 1 L. R. 25 C., 354; see *Ganesh Jagannath Dev v. Ram Chandra Ganesh Dev*, 1 L. R. 21 B. 563]. A probate is of the same effect as if the will had been proved immediately after the death of the testator. The executor has thus his right immediately on the death of the testator, "and the right draws after it a constructive possession" (4). See *infra*, sec. 59 (P), and *supra* sec. 4 (P)]. Thus it is clear that, "nothing but the probate or letters of administration with the will annexed, is legal evidence of the will," in all questions of representation [*Pinney v. Hunt*, 6 C. D. 100; *Rex v. Netherseal*, 4 T. R. 260; *Newton v. Metropolitan R. Way* 1 Dr. and Sm. 583]. The will itself is no evidence [*Pinney v. Pinney*, 8 B. and

(1) Wms. 297-98; Coote 20; Walker and Elg. 139.

(2) Coote 20; Tr. and Coote 20; Wms. 629.

(3) See sec. 41, Act I of 1872 (The Indian Evidence Act). The words "legal character" in that section, include the office of an executor [*Girish Chandra Roy v. Broughton*, 1 L. R. 14 C., 861].

(4) Walker and Elg. 139.

C. 335] (1) although its existence may be proved without probate [*Janaki v. Dhanu Lall*, (1891) I. L. R. 14 M., 454; see *Allen v. Dundas*, 3 T. R. 125; *Noell v. Wells*, 1 Lev. 235].

§ 2a. **Effect of probate of a will under power.**—It has already appeared that a will executed in the exercise of a power of appointment, requires to be probated like an ordinary will, [sec. 6 (P) *supra*]. As to the effect of such probate it has been ruled in England that it is conclusive so far only as the testamentary character of the instrument is concerned. It is for the Court of Construction to determine whether the formalities (prescribed by the instrument creating the power) have been complied with [*Douglas v. Cooper*, 3 Myl. & K. 378], and whether the power has been duly exercised in other respects [*Paglar v. Tongue*, L. R. 1 P. & D. 158] (2).

§ 3. **Evidentiary value of probate.**—"The grant of probate is the decree of a Court" [*Komullochun Dutt v. Nilrutton Mundle*, *supra*] and "the judgment of a Court of Probate granting or refusing probate is a judgment *in rem*" [*Chinna Sami v. Harihara Badra* (1893), I. L. R. 16 M., 380]. But the probate itself is not a decree, order or judgment [see *Rajib Panda v. Chowdhury Lekhan Sindh Mohapatra*, 3 C. W. N. 660, at 668; I. L. R. 27 C., 11, at 22; see also definition of 'decree' in Hukm Chand's C. P. Code]. So "the effect of probate for purposes of evidence is not treated as standing on the same footing as an ordinary judgment. It is treated as a *quasi estoppel*" [Mr. Justice Norman, in *Sharo Bibi v. Baldeo Dass* (1867), 1 B. L. R. 24]. See *post* sec. 55 (P) § 4.

§ 3a. **Conclusiveness of probate.**—As, however, a judgment *in rem* is binding upon all the world as to the precise point directly decided, the judgment of a Court of Probate granting a probate is conclusive only as to the point actually decided; so that, as regards points which incidentally arise, it is like any other judgment, and the decisions on such points are not conclusive [see *Concha v. Concha*, 11 A. C. 541; *Bailey v. Harris*, 18 L. J. Q. B. 115]. See also Taylor's Evidence § 1677, 10th ed.

Refusal to grant probate for want of sufficient evidence, is not conclusive in its effect [*Ganesh Jagannath Dev v. Ramchandra Gonesh Dev*, 21 B., 563]. See *infra* sec. 55 (P), § 4. Probate is conclusive (a) against all the world (3) in regard to the following:—

(a) As to the conclusiveness of a grant of probate as a judgment *in rem*, the general rule seems to be, as seen above, that it is not conclusive in regard to a fact the finding of which was not necessary [*Concha v. Concha*, *supra*]. Thus it is not conclusive as regards domicile [*Concha v. Concha*, *supra*], or as regards a deed of release which the will purported to confirm, where the party opposing the release claimed adversely to the will [*Kurratulain Bahadur v. Peara Sahib*, 9 C. W. N. 938; L. R. 32 I. A. 244; 33 C., 116; 1 C. L. J. 594; 7 Bom. L. R. 876; 15 M. L. J. 336; 2 A. L. J. 758]. The facts of the last named case and extracts from their Lordships' judgment, are given below.

A., a Mahomedan lady executed a release in favour of B. She subsequently executed a will by which she confirmed the release. The will was challenged by the heirs of A, on the ground that it had been obtained by undue influence, but the objection failed and it was admitted to probate. The heirs then sued B. to set aside the release on the same ground, and for consequential relief. The High Court held that the heirs were estopped from showing that the confirmatory clause in the will had been inserted by undue influence and that the release was, therefore, valid and operative. The heirs preferred an appeal to

(1) See exception 2, sec. 91, Act I. 1872 (Indian Evidence Act).

(2) Jarm., 890, 6th Ed.

(3) Hawk. 8.

(i). The contents and validity of the will, that is, the fact that the will expresses the true will of the testator (1) [*Hormusji Navroji v. Bai Dhanbaji* (1887) 1 L. R. 12 B., 164; observations of White J. in *In re Bhaba Sundary Dabee*, 1 L. R. 6 C., 460 at 463; *Brajanath Dey Sircar v. Anandamoyi Dasi*, 8 B. L. R. O. C. 208; *Bal Gangadhar Tilak v. Sakwarbai* 26 Bom. 792; *Chintaman Vyankatrao v. Ramchandra Vyankatrao* (1910) 34 B., 589; *Allen v. M'Pherson*, 1 H. L. Cas. 191]. It is also conclusive as to what the words of a will are (2). See *infra* sec. 59 (P).

(ii). The due execution of the will according to the law of the country where it is proved [*Whicker v. Hume*, 7 H. L. C. 124].

His Majesty's Privy Council where it was resisted on two legal grounds: (i) That the appellants were estopped from denying the validity of the confirmation of the release by the probate proceedings, or in other words, by the doctrine of *res judicata* and (ii) they were estopped by the effect of the probate itself, as contemplated by the Probate and Administration Act. Their Lordships of the Judicial Committee reversed the decision of the High Court, both of these grounds being held untenable. Their decision on the first ground is noted in section 55 (P) *infra*, under the head of *Res judicata*. On the second ground it was held that the provisions of the Probate and Administration Act could not be applied so as to give to the probate the effect contended for.

In delivering their Lordship's Judgment Sir Arthur Wilson said: "A Mahomedan testator has not an unlimited power of disposition by will; he can only deal with one-third of his property, the remaining two-thirds pass to his heirs * * *. Thus the executor, when he has realised the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts, one is created by the Act and the probate irrespective of the will the other, by the will, established by the probate." His Lordship then referred to the provisions of sections 4, 12, 59, 88 & 90 of the Probate and Administration Act and made the following further observations:—"Those enactments appear to their Lordships incapable of being applied so as to give to the probate in the present case the effect contended for. The appellants do not, in this action, contest the title of the executor, though they show that, as to two-thirds of the estate he is a mere trustee for them. They are not debtors of the estate, nor possessed of the property belonging to it. They are not interested under this will. But they say that they are entitled to two-third parts of all the property of the testatrix which was not effectually disposed of by her in her lifetime. It is now admitted that the release was ineffectual for that purpose, and if so, the money and other property in the hands of Peara Saheb was in the disposition of the testatrix at the time of her death. As she could not dispose of more than one-third part of it by her will, the confirmation of the release could not confirm Peara Saheb's title in more than that one-third, and the appellants are entitled to the other two-thirds. The controversy is between the heirs claiming adversely to the will and a person who claims a beneficial interest under the will, and the provisions of the Act which have been cited seem to their Lordships to create no estoppel in such a case" [*Kurratulain Bahadur v. Peara Saheb*, 9 C. W. N. 938; 33 Cal. 116; 1 C. L. J. 594; 15 M. L. J. 336].

It seems to be clear from the foregoing that their Lordships did not intend to lay down any general rule as regards the effect of probate except so far as it entitles the executor to administer the deceased's estate and adjust the rights of all parties connected with it. Their decision so far as it goes to show that no estoppel was created proceeded mainly upon this ground only—the rights which are conferred upon executors by the Probate and Administration Act. They have expressed no opinion as to whether the decision of the High Court so far as it holds that a caveator having unsuccessfully assailed the whole will on ground of undue influence is estopped from subsequently showing that a part only had been inserted through undue influence, is correct as a proposition of law. Nor have they said anything as regards the conclusiveness or otherwise of probate as to the contents of will.

It may be submitted therefore, that there seems to be no reason why the confirmation of the release in the above mentioned case, should not be regarded as a fact the finding of which was not necessary for the purpose of the grant.

(1) Wms. 556; Walker & Elg. 104.

(2) Hawk. 8.

(3) See the question discussed in *Hukm Chand's 'Res Judicata'*, pp. 513—16.

(4) Wms. 556; Tr & Coote 352; Theob. 75, 5th Edn.

(iii). The appointment of executor [see *Bal Gangadhar Tilak v. Sakharbai*, *supra*; *Griffiths v. Hamilton*, 12 Ves. 298] and the nature of his representative (legal) character [*Allen v. Dundas*, 3 T. R. 125]. Until, therefore, a grant is revoked or recalled as provided in section 50 (P) *post*, it cannot be shewn that the testator was insane, or that the will was forged; for these facts might have been alleged in opposition to the grant of administration [see *Allen v. Dundas*, *supra*; *Att. Gen v. Ryder*, 2 Ch. Cas. 178; also *Komullockun Dutt v. Nilrutton Mundle*, *supra*]. So that, "If the whole or any part of a will is procured by fraud, the objection must be taken when the probate is applied for". See *infra* sec. 59 (P) & *supra*, sec. 48 (S) § 24.

§ 3. "Renders valid.....of the executor as such."—Immediately on the death of the testator, the testamentary disposition in favour of the executor, becomes a vested interest (1); "and hence it is, that an executor, whether he be absolute or conditional, while he is executor may do any thing as executor (subject to certain restrictions as to the full exercise of his powers) as well before the probate of the will, as he may do after" (2). See sec. 82 (P), *post*.

Accordingly, before probate an executor may enter into and seize the goods and chattels whatever they may be, or give power to another so to do; pay or release debts; release actions; distrain for rent due to the estate; sell (a), release or assign, or otherwise dispose of the testator's effects; assent to or pay legacies; and "if the holder (of a bill of exchange) be dead, and the executor has not yet proved the will, still it seems the executor is bound to present the bill, when presentable." That is, an executor may do almost all the acts, which are incident to his office, except only some of those which relate to suits. (3) But although an executor can make an assignment and give a receipt for the purchase money, it seems, before probate, the purchaser is not bound to pay that money, until probate has been obtained: because, till the evidence of title exists, the executor cannot give a complete indemnity [*Newton v. Metropolitan R. W. Co.* (1861) 1 Drew. and Sm. 583; see *Re Stevens: Cook v. Stevens* (1897) 1 Ch. 422] (4).

These acts (a) stand good and valid even if the executor should die without proving the will. Thus if an executor assents to a legacy, and dies before probate, the assent is good and valid. So all payments made to him are good, and shall not be defeated, though he dies and never proves the will. "In a word, the executor's not proving the will does, upon his death, determine the executorship, but not avoid it." [*Wankford v. Wankford*, (1703) 1 Salk. 301] (5).

But it is unnecessary that the will is ultimately proved [see *Brazier v. Hudson* (1836) 8 Sim. 67.]

(a) In these acts, (2) that is, those which the executor may do before probate, it is of the utmost importance to see in what capacity the executor acts—whether in his personal capacity or representative capacity. If the act is purported to be done in his representative capacity, his title as an executor must be proved. See Code of Civil Procedure (v of 1908), Or VII. r. 4.

(1) Shep. T. 465; see Walker & Elg. 139.

(2) Shep. T. 474.

(3) See Wms. 220-225, 10th Ed., Inghens, 63; 14 L. of Eng. 144-145.

(4) Wms. 306-9; Elg. 140; Shep. T. 474; Hend 324; 14 L. of Eng. 144-145.

(5) Wms. 306; Hend. 324; Walker and Elg. 141 L. of Eng. 145.

In England though an executor cannot maintain suits (a) before probate (except upon his actual possession), he may commence them and carry them on to the stage where the production of the probate becomes necessary (1). But in this country the first step in a suit is the presentation of a verified plaint, which must show, when the plaintiff sues in a representative character, not only that he has an actual existing interest in the subject-matter, but that *he has taken steps necessary to enable him to institute a suit concerning it*; as for instance, where A sues as B's executor, the plaint must state that A has proved B's will (2).

On the other hand, if the executor has elected to administer, he may, before probate, be sued by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible (3). So in England, and in the High Courts in this country, the residuary legatee may sue an executor before probate, for an account of the estate and effects of the testator, and to have the assets secured (*Blewitt v. Blewitt*, 1 *Younge*, 541) (4).

§ 5. Qualified nature of executor's representation.—But although the property of the deceased vests in the executor from the moment of the testator's death [*Kolla Subramaniam Chetti v. Thellanayakulu Subramaniam*, I. L. R. 4 M., 124], it is not clear that in this country the executor represents the deceased for all purposes until he has obtained probate. In *Prosunno Chundra Bhattacharjee v. Kristo Chaitanna Pal*, [(1878), I. L. R. 4 C., 342; 3 C. L. 154] Mr. Justice Markby, (Prinsep J. concurring), in answer to the question, whether the creditors of a deceased person are liable to have their claims defeated by the trick of keeping secret the existence of a will until their claims are barred by limitation, expressed his opinion to the effect that the person taking possession of the estate of a deceased Hindu (who has left a will, of which however, no probate has been granted) must, in the present state of the law, be treated for some purposes as his representative, until some other claimant comes forward; and that a judgment obtained against such a representative is not a nullity (5). [See *Chunilall Bose v. Osmond Beeby*, 30 Cal. 1044]. This case was followed in *Janoki v. Dhanu Lal* (1891), [I. L. R. 14 M., 454], in which it was held that where a testator leaves a will but the executor delays or declines to prove it, his creditor's remedy is to

(a) As regards suits, the general rule seems to be that an executor can maintain them before probate where they are founded upon his actual possession [*Oughtou v. Seppings* (1830). 1 B. and Ad. 241]: but if the possession is in dispute he must prove his title as executor [*Penney v. Penney* (1828) 8 B. and C. 335] (1). In *Yamsetji Nassarwanji v. Hirjibhai Naoraji* [(1912) 15 Bom. L. R. 192], it has been held by the Bombay High Court that an executor is capable of instituting a suit without obtaining probate although he might not be able to proceed as far as decree without obtaining it. See *Vasques v. Pragji*, 16 Bom. 519; *Brojo v. Iswar*, 19 Cal. 482; *Kammathi v. Manappa*, 16 Mad. 454; also *Mana Singh v. Ahmed*, 17 M. 14.

(1) Wms. 311; Walker and Elg. 141.

(2) Code of Civil Procedure (Act V of 1908) Or. VII, r. 4.

(3) Wms. 313.

(4) Wms. 314; Stokes 139; Walker and Elg. 143 144.

(5) This view of the law was laid down with some diffidence. His Lordship's concluding words are these: "I give this opinion with some hesitation as the subject is one which in its general bearings has not been much considered."

But it will appear that the hardship and injustice which occasioned the expression of the above view no longer exists, as under sections 21 (P) and 23 (P) the creditor himself may obtain letters of administration to the estate of his deceased debtor (see observations of Bannerjee J., in *Ram Chandra Mukherjee v. Ranjit Singh*, I. L. R. 27 C., 256).

sue whoever may be in possession of the properties of the deceased. [See *Sankara Subbayyar v. Ramasami Ayyanar*, 1897, I. L. R. 20 M., 454].

But where the executor having taken out probate dies before any such suit, it seems, the creditor is bound to proceed against the person who represents the estate by grant of Court [*Matangini Dassee v. Chooneymoney Dassee* I. L. R. 22 C., 903]. Generally speaking, in a suit by a creditor against the estate of a deceased debtor, who died leaving a will, his heirs *ab intestato* do not represent the estate [*Ibid*; *Harish Chundra Biswas v. Puridas Das* (1910) 14 C. W. N. 1041; 12 C. L. J. 561].

In cases outside the Presidency town of Bombay, an executor has been held to have a title to a certificate under Act VII of 1889, which is superior to all others, although he might not have proved his will and obtained probate [*Kalidas Fokirchand v. Bai Mahdli* I. L. R. 16 B. 712; *Dave Liladhar Kashiram v. Bai Parvati*, I. L. R. 18 B., 608; *Manchram v. Kaltdas* I. L. R. 19 B., 821].

§ 6. Validity of acts depends upon validity of probate.—In *Haripriya Dassi v. Sarat Chandra Shaha* [1889, 3 C. W. N. ccxii], Mr. Justice Bannerjee (now Sir Gooroodas Bannerjee) held, that this section “validates the acts of executors previous to the grant of probate when such probate remains in force and is not revoked.” So Mr. Justice Markby in *Komullochan Dutt v. Nitrutton Mundle* [I. L. R. 4 C., 360],—“so long as the probate exists it is effectual for that purpose,” (at p. 362) ‘Thus acts done by a person under a title created by a will which has been declared to be a forgery, are void’ [*Pundit Prayag Raj v. Goukaram Persad Tiwary*, 6 C. W. N. 787].

§ 7. Effect of probate before the Hindu Wills Act.—Before the Hindu Wills Act, probate was no proof of will, nor did the executor take any thing from the grant of Court [*Saro Bibi v. Baldeo Dass* (1867) 1 B. L. R. O. C. J. 24; *Joy Kali Debi v. Sibnath Chatterjee* (1866) 2 B. L. R. O. C. J. 1]. As regards the evidentiary value of probate, Mr. Justice Norman said, in *Sharo Bibi's* case :—“As against those who get the probate or oppose its grant, it is no doubt binding; as against parties cited it is evidence, but it has no greater effect than the ordinary decree of a Civil Court against persons who have no means of appearing in the suit, or right to dispute the grant.” In *In re Haji Ismail Haji Abdul* (I. L. R. 6 B., 252), it was held by Westropp C. J., that in cases to which the Indian Succession Act did not apply, probate and letters of administration took effect only for the purpose of recovering debts and securing debtors paying the same except so far as is otherwise provided by Act XXVII of 1860.

§ 8. Probate where not conclusive.—Probate or letters are not conclusive as to any collateral matter, which may be inferred from the sentence of the Court by argument. Thus letters of administration which have been granted to a person for administering the estate of A. B. deceased, are not *prima facie* evidence of A. B.'s death [*Blackham's case*, 1 Salk. 290]; but probate has, under similar circumstance, been held to be evidence of the testator's death (*French v. French*, 1 Dick. 268). So letters of administration without will annexed, are evidence of intestacy [*Tourton v. Flower*, 3 P. Wms. 370] (1). But probate is no evidence as to whether the testator had a disposing power over the property, the subject of his will [see *Teen Cowree Dassee v. Hurreehur*

Mookerjee, 8 W. R. C. R. 308]. Similarly, probate or letters, are no bar to any prosecution for forgery. Thus on a charge of forging a will, probate of that will shall not be conclusive evidence of its validity, so as to stand as a bar to the prosecution (1). Neither does it conclude the parties as regards their title to the property which the will purports to dispose [*Chintaman v. Ramchandra* (1910) 12 Bom. L. R. 694; *Lalitmohan Das v. Radharaman Saha* (1911) 15 C. W. N. 1021; 13 C. L. J. 547].

In a suit involving a question as to the validity of a will and regarding property covered by it, where a compromise was entered into leaving the question of the validity of the will untouched, and after such compromise the will was proved and probate granted, it was held, the probate did not affect the title of the plaintiff in that suit [*Thakurain Lekhraj Kunwer v. Thakur Harpal Singh* (1911) 16 C. W. N. 217; 15 C. L. J. 72].

§ 9. **Effect of probate on certificate.**—A grant of probate or letters of administration in respect of any estate, supersedes any certificate previously granted under the Succession Certificate Act (Act VII of 1889), in respect of any debts or securities included in that certificate (see sec. 21, Act VII of 1889).

§ 10. **Effect of order for probate and of issue of probate.**—Although probate completes the representative title of a lawful executor, it has been held that until such probate is issued and actually taken out, a person intermeddling with the assets, constitutes himself an executor *de son tort* notwithstanding an order for probate had been previously made [*Navesbhai v. Pestonji Ratanji*, 1. L. R. 21 B., 400]. So, a mere order for probate, unless such order is followed by actual grant thereof, does not prove the will or make the executor a representative [*Mohamidu Mohudenn Hadjor v. Pitchay* (1894), Ap. Ca. 437; *Lakhya Dasya v. Umakant Chakraverti* (1909) 14 C. W. N. 250].

§ 11. **"When granted."**—According to English law the property of the deceased vests in the executor from the moment of the testator's death (2) (a). Is the law in India different from the English law in this respect? The authorities seem to be conflicting on the point. In *Administration General of Bengal v. Premlal Mullick* [1. L. R. 22 C., 788, at 796], their Lordships of the Privy Council say: "It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August 1889, and his executors, therefore, *on their obtaining probate* (italics mine) became immediately vested, by force of Statute, with the whole estate which belonged to him at the time of his decease." These words leave no doubt that the law here is different from the English law and the testator's

(a) According to some authorities the right of the executor even in England is inchoate immediately on the death of the testator (1). Messrs. Powles and Oakley say that an executor derives his authority from the will and "is in possession of the property *in point of law* (italics mine), from the death of the testator and before probate is granted" (3). See, however *Re Pawley and London and Provincial Bank* [(1900) 1 Ch. 58], which may be regarded as establishing the proposition that the estates of a testator vest in all the executors 'irrespective of the question whether they have obtained probate or not.'

(1) Wms. 569.

(2) Wms. 636, 637, 8th Ed.; 314-318, 10th ed.; 11 L. of Eng. 6.

(3) See J. Wms. 121; Powl. and Oak. 156; Wms. 314-318 10th Ed.; 11 L. of Eng. 5; see also Markby's Ele. of law, §§ 803, 804, pp. 392, 393, 6th Ed.

estate does not vest in the executor until he has taken out probate. [See *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*, I. L. R. 25 C., 103, at 106; *Prosunno Chandra Bhattacharjee v. Kristo Chytunno Pal*, I. L. R. 4 C., 342, at 345; 3 C. L. R. at 156; *Dhirendra Kant Ray Choudhury v. Saradindu Roy*, 9 C. W. N. xci; 1 C. L. J. 28 n.; *Sheik Moosa v. Sheik Essa*, I. L. R. 8 B., at 255; *Mathuradas Lowji v. Goculdas Madhowji*, I. L. R. 10 B., 468; *Bai Harkor v. Manik Lal Rasikdas*, I. L. R. 12 B., 621; *Mohamidn Mohideen Hadjior v. Pitchey*, *supra*). And this view seems to be consistent with the theory that "upon the death of an executor or administrator of a deceased person, the estate of the latter is absolutely unrepresented until some one comes forward and gets a grant of letters" [Macpherson J., in *De Souza v. Secretary of State*, 12 B. L. R. 423, O. C. J.]; the result being that, an executor who has merely proved the will, does not represent the estate [*Mohamidn Mohideen Hadjior v. Pitchey supra*]. See post sec. 82(P). *

Mr. Phillips and Trevelyan J. hold a contrary view. They are of opinion "that the powers of an executor are not dependent upon probate," suggesting thereby, that the vesting is not deferred until the grant of probate (1). This view is supported by *Kamullochun Dutt v. Nilrutton Mundle* [I. L. R. 4 C., 360], and *Jehangir v. Bai Kukibibi* [I. L. R. 27 B., 281; see *Antony Cruz Gonzales v. Makis Boopal rayan* (1910), I. L. R. 34 Mad. 395], and is consistent with the rule that an executor may prove the will at any time before the estate is fully administered.

The result of the authorities, however, seems to point to the conclusion that, it is not correct that the vesting of property is actually deferred until the grant is made, but that the grant only perfects the vesting, so that, before such grant an executor or administrator has "an appearance of interest" or *contingent* interest which is sufficient, at least, to entitle him to call upon his co-executors to account. Thus it may be submitted that, before grant, the vesting is *conditional* whereas after grant it is *absolute*. It does not seem, therefore, to be the intention of the Legislature that in this country an executor who has not taken out probate, is to be regarded as a stranger, having no interest whatever in the property of the deceased. [See *Jehangir v. Bai Kukibai*, I. L. R. 27 B., 281]. See sec. 59 (P), *post*, and § 1, *supra*, and the observations of Sir Arthur Wilson in [*Mirza Kurratulan Bahadur v. Peera Sahab*, 33 C., 116, P. C. and sec. 4 (P) *supra*].

But see sec. 82 (P), *post*, which will show, that before grant there is neither representation nor vesting.

§ 12. English & Indian probate, the same in effect.—Mr. Justice Strachey, late of the Bombay High Court, said: "Subject to a few modifications * * *, the probate of the Indian Succession Act is substantially a reproduction of that which the Commissioners who framed the Act found in the English law. The rights and functions of an executor, the limitation of the effect of the probate within a particular local area, the necessity of a foreign probate or grant of administration for recovering assets situate within a foreign jurisdiction, the comity which would generally lead the foreign Court to follow the grant of the Court of domicile—all this is for the most part the same in India as in England." [*In re Abraham*, I. L. R. 21 B., 139 at 149].

129. 13. (P).—Letters of administration cannot be
189 (s)

Persons to whom
administration may
not be granted.

granted to any person who is a minor or is
of unsound mind.

Note.—As to probate the corresponding section is 8 (P), *ante*

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 4. *Persons capable of being administrators.*

§ 2. *Preliminary.*

§ 3. *"Letters of administration," meaning of.*

§ 5. *"Any person who is a minor."*

§ 1. **The section.**—This is section 189 of the Indian Succession Act, with the exception of the words "nor to a married woman without the previous consent of her husband." Thus there is nothing to prevent letters of administration being granted to a married woman in cases within the operation of this Act, without the consent of her husband.

As to the power of a married woman to whom letters of administration shall have been granted, see *post*, sec. 96 (P).

§ 2. **Preliminary.**—Administration (a) is either with the will annexed (*cum testamento annexo*), or without it, *i.e.* simple. Simple administration is granted in cases of intestacy; and administration with the will annexed is granted where no executor is appointed, or when the appointment of executor fails (1). As to when the appointment of executor fails see sections 18 (P) and 19 (P), *post*.

This section treats of administration, generally, *i.e.* *simple*, as well as, *with the will annexed*.

§ 3. **Letters of administration," meaning of.**—The grant under which the title and authority of an administrator are derived is usually denominated *letters of administration* (2). See sec. 4 (P), Intro.

§ 4. **Persons capable of being administrator.**—"All persons who are qualified to act as executors are also qualified to act as administrators, with this exception that as an administrator is required to give a bond as security for the due performance of his office, it follows that all persons who are unable to execute such a bond are in fact disqualified" (3). Hence letters of administration

(a) Administration meaning of.—Generally, it means the management of the deceased's estate. 'It includes more than the mere collection of the assets the payment of debts and legacies and distribution to the next of kin. It involves all that may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees, or legatees or which may be done by them in securing their rights; and it includes all which may be done, and rightfully done in relation to adverse claims to assets which have come to the possession of the administrator as the property of the testator or intestate.' [See 18 Cyc. (Am) 57; sec 45 (P) *infra*; *Baroda P. Bannerjee v. Gajendra Nath Bannerjee* (1909) 13 C. W. N. 557, 572; 9 C. L. J. 383 at 403].

(1) Wms. 468; Bro. P.P. 150.

(2) Wms. 409-10.

(3) Bro. P.P. 159.

cannot be granted to any person who is a minor or is of unsound mind. See however sections 31 (P), 32 (P) and 33 (P), *post*, and *ante* sec. 8 (P).

The Court of Wards not being a "person" [*Ganjeswar v. Collector of Patna*, I. L. R. 25 C., 795; 2 C. W. N. 349], cannot, as such, be appointed administrator [*In re Troylucko Nath Biswas : Nritha Gopal Biswas v. Administrator Gen. of Bengal*, 10 C. W. N. 241].

§ 5. "Any person who is a minor."—A foreigner, though of age being 16 years old according to the laws of his own country, must be of 18 years before he can apply for letters of administration under this Act in any Court in British India, within the jurisdiction of which he might be carrying on his business. [*In re Sew Narain Mohata*, (1894), I. L. R. 21 C., 911].

This section prohibits the grant even under the guardianship of the minor's father [*Jai Lal Singh v. Hari Singh*. A. W. N. 1908, 257]. See *post*, sec. 33 (P).

130. $\frac{14}{191 \text{ (s)}} (P)$.—Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

Effect of letters of administration.

131. $\frac{15}{192 \text{ (s)}} (P)$.—Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

Acts of administrator not validated by letters of administration.

[Secs. 14 (P) & 15 (P)].

NOTES AND COMMENTARIES.

- | | |
|---|---|
| 1. The section. | § 4. "All rights belonging to the intestate." |
| § 2. Nature of administrator's rights before grant. | § 5. Conclusiveness of letters of administration. |
| § 3. Vesting before grant. | |
| § 6. Miscellaneous. | |

§ 1. The section.—These two sections evidently refer to *general* or *simple* administration, as the word "intestate" indicates, and they treat of the rights of administrators, and the time when the rights of the deceased vest in them. The rights of administrators to do intermediate acts depend in a great measure upon the time when such rights vest in them.

§ 2. Nature of administrator's rights before grant.—Messrs. Walker and Elgood say: "That an administrator's title is derived from,

and is first called into being, by the letters of administration is indisputable, but the proposition has led to directly contradictory decisions, according as it has been taken in its naked literalness, or been supplemented by a fiction to be presently noticed."

"The proposition, nakedly accepted, denies an administrator any title or authority until administration has been granted to him, and then only in respect of things then existing or coming afterwards into existence. Accordingly, it has been held that, before administration granted, an administrator cannot release an action (citing *Middleton's case*, 5 Co. 28 a.) or a debt (*Barefoot v. Barefoot* 1 Palm 411; *Whitehall v. Squire*, 1 Salk. 295), assign the deceased's property (3 Preston Abstr. 146), or bring an action (*Wankford v. Wankford*, 1 Salk. 301), though he be an administrator with the will annexed [*Phillips v. Hartley* 3 C. and P. 121] * * * *."

"The effect of strict decisions like the above was to leave the administrator helpless and remediless in the face of wrongs done to his deceased's estate in the interval between the death and the grant of letters to himself. To repair such a miscarriage of justice, the Courts adopted the convenient fiction that letters of administration, when obtained, operate retrospectively, having relation back to the death of the deceased, so as to enable the administrator to sue before the grant to him of administration, or, after administration, in respect of matters occurring previously thereto [*Humphreys v. Humphreys*, 3 P. Wms. 351; *Foster v. Bates*, 13 L. J. Exch. 88; *Louisa Kunha v. Coelho*, 18 M. L. J. 158; 31 M., 187; *Charu Chander Dutt v. Sarat Chandra Singh* (1910) L. J. 537, 543]; but it would appear that he can only sue when the act done is for the benefit of the estate [*Morgan v. Thomas*, 8 Exch. 302], and in order to make the estate liable for services rendered whilst there is not legal personal representative, not only must they be for the benefit of the estate, but they must have been rendered under a contract with one who subsequently becomes the legal personal representative, and ratifies the contract." (*Re Watson*, 19 Q. B. D. 234). "These actions, founded on the fiction of relation, are based upon the broadest ground of equity, viz., that otherwise there would be no remedy for the wrong done. The contrary decisions, while they possess the superficial merit of logical accuracy, are altogether wanting, it is submitted, in the substantial feature of justice"(1).

As a general rule, therefore, an administrator has no title until letters of administration are granted, as "the property of the deceased vests in him only from the time of the grant" [*Antony Cruz Gonsalves v. Mathis Boopal rayan* (1910) 20 Mad. L. J. 984; 34 M., 395]; so that, letters of administration have no relation to the death of the intestate, so as to give validity to acts done before such letters are obtained. But the rule is subject to this qualification that, such relation exists only in those cases where the acts done

are for the benefit of the estate. In other words, letters of administration relate back to intermediate acts when such acts benefit the estate. (*Foster v. Bates*, *supra*;

Louisa Kunha v. Coelho, *supra*; *Charu Chander Dutt v. Sarat Ch. Singh* (1910) *supra*]. This is called the doctrine of relation (2). But in spite of this relation back, the deceased's property does not vest in the administrator before letters are granted by the Court, that is to say, by virtue of this section, the deceased's estate does not vest in the administrator as from the date of his death.

(1) Walker & Elg. 145-47; see Wms. 410-14 & 637-38.

[Eng. 146-147.

(2) Wms. 410-14, 637-38; Walker and Elg. 146-47; see Shep. T. 474; and 14 L. of

As an example of an act which is rendered valid by *relation*, it may be noticed that, if an administrator before taking out letters, gives order or sanctions the order which another person has given for the funeral of the deceased he will be thereby bound after he has taking out letters, to satisfy, the charges incurred under such order (1).

Thus according to this section, the intermediate acts of the administrator will be rendered valid by relation back if only such acts do not tend "to the diminution or damage of the intestate's estate;" so that, it is not necessary that they should actually benefit that estate.

It seems, section 190 of the Indian Succession Act which has not been incorporated in this Act, is based on the principle that letters of administration have relation only to the time of the grant. This may be illustrated by *Sukhnandan v. Rennick* (I. L. R. 4 A., 192), in which the plaintiff, a creditor of the deceased, obtained decrees against his heirs, and in execution thereof caused some of his properties to be sold, before those heirs had taken out letters of administration, and it was held that such decrees and execution proceedings conferred no title on the plaintiff in respect to any property of the deceased, because the only person entitled to deal with such property being the properly constituted administrator, the defendants though heirs, and in possession, did not represent the estate left by the deceased at the time when the plaintiff obtained and executed his decrees [see *Gramji Dorabji Ghaswala v. A'darji Dorabji Ghaswala*, I. L. R. 18 B., 337].

§ 3. Vesting before grant.—In England, the goods and chattels of a person dying intestate originally vested in the king, and then in the Ordinary. Such property never vested in the heir or next of kin. Now, however, under section 19 of the Court of Probate Act, 1858, until letters of administration are granted, the personal estate and effects of such deceased person vest in the President of the Probate Division of the High Court for the time being, and such Court hands them over to such administrator as it appoints by granting letters of administration. In India there being no difference between realty and personalty and the heir's right to succeed being superior and indefeasible, both realty and personalty vest in such heir immediately on the death of the owner intestate; and consequently until grant of letters is made the dealings of such heir in regard to those property, are valid and binding on the administrator [*Antony Cruz Gouslaves v. Mathews Boopalrayan* (1910) 20 M. L. J. 984; 34 M. 1395].

In case of testacy, although the property vests in the executor under sec. 4 (P) *ante*, the title of the heir remains unaffected thereby. See *supra* sec. 4 (P) § 1.

§ 4. "All rights belonging to the intestate."—These words seem to indicate that, rights of action which survive the intestate, accrue to the administrator from the moment of his death and the administrator can, as provided in section 15 (P), maintain actions thereupon, and may do all acts that benefit the estate, even before any grant is made to him. [See section 88 (P) *post*]. But this does not seem to be in accord with the rules of English law according to which "no right of action accrues to an administrator until he has sued out letters of administration."

§ 5. **Conclusiveness of letters of administration.**—Letters of administration are as conclusive evidence of the title of the administrator, as a probate is, with respect to that of an executor (1). This is due to the legal consequence of the exclusive jurisdiction of the Court of Probate (2).

§ 6. **Miscellaneous.**—One of two co-widows having obtained letters of administration, the other may, at any time, maintain a suit for partition, such letters being no bar to any such suit [*Dal Koer v. Panbas Koer*, 8 C. W. N. 658].

132. **16 (P).**
193 (s).—When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship ;

Grant of administration where executor has not renounced.

except that, when one or more of several executors has or have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

Exception.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Reason of the rule.*

§ 3. *Citation.*

§ 4. *Corollary.*

§ 5. *Renounce.*

§ 6. *Exception.*

§ 7. *Absence of citation, effect of.*

§ 1. **The section.**—Sections 16 (P) to 22 (P), both inclusive, contemplate cases where the deceased has left a will. Letters of administration contemplated by this section are, therefore, letters of administration *cum testamento annexo*.

§ 2. **Reason of the rule.**—According to what is called the doctrine of priority, the claim of any person having superior interest is preferable to that of one having an inferior interest. Therefore, in order “to enable any person having an inferior interest to take administration (with or without will annexed) all persons having priority must have first renounced or waived their rights or having been cited must have neglected, by their non-appearance, to avail themselves of such rights” (3). See sec. 21 (P) § 1.

(1) See Tr. and Coote 352.

(2) See Wms. 556.

(3) Coote 215; Walker and Elg. 37.

In cases of wills, the executor being *facile princeps*, is superior to all. He has an equal only in a co-executor (1); and the office of an executor being a private one of trust "named by the testator and not by the law," an executor cannot be compelled to take out probate, but he may accept or refuse the executorship at his pleasure (2). Hence an executor must either renounce, or be cited before any party having an inferior interest can take out letters of administration. Or, as this section provides, when an executor has not renounced, letters of administration shall not be granted to any person until a citation has been issued calling upon the executor to accept or renounce his executorship (3).

"Any other person."—These words evidently refer to a person inferior to an executor.

§ 3. Citation.—It being necessary, therefore, for one having superior interest to renounce before one having an inferior interest can obtain a grant, and there being persons who will neither take the required grant, nor waive their rights to it, justice requires that the Court should give its aid to the applicant having an inferior interest when he fails to procure the renunciation of one holding the superior interest. The mode in which the Court gives such aid is by *Citation* (4).

"A *Citation* is, in general, a command * * * for the most part ordering the party, to whom it issues and on whom it is served, to do some particular act, as to accept or refuse probate or administration." Sometimes the order is to bring in a probate or Administration, which is said to have been granted improperly [sec. 50 (P), 54 (P)]; sometimes merely to see proceedings, that is, to become a party to a suit; and sometimes it is no more in effect than a mere notice (5). In short, 'Citation' is a summons to appear, and the word is applied particularly to processes in the Probate Courts (6). See sec. 69 (P) § 7, *post*.

Thus there are four kinds of citation generally in use. These are—(a), to see a will proved; (b), to bring in probate; (c), to bring in letters of administration; and (d), to see proceedings (7).

The order issued by the citation must be in the alternative, viz., to do the act ordered, or to show cause why it should not be obeyed. "If it leaves no option to the party cited but obedience to its requisitions, it is said to be a nullity." But the order to bring in a probate is of a different nature [see section 54 (P), *post* and *Ackerley v. Parkinson*, 3 M. & S. 411] (8).

According to the practice in England, citations may be served by advertisement when the party cited is in a foreign country and has no attorney or agent empowered to receive such citation [*Kenworthy v. Kenworthy*, 32 L. J. P. and M. 107] (9). As to the practice here, see sec. 69 (P), *post*.

(1) Tr. & Coote 230.

(2) Wm. 278; Bro. P.P. 147; Shep. T. 466; Walker & Elg. 13.

(3) Wms. 474; Walker & Elg. 13.

(4) Coote 224; Wms. 474.

(5) Bro. P. P. 349.

(6) Wharton Art. "Citation,"

(7) Flood. 676,

(8) Bro. P. P. 349.

(9) Bro. P. P. 359; Tr. & Coote 247; Hend. T. S. 170, 2nd Edn.

Instances of citations upon executors to bring in their will and prove them are not wanting in this country [see *Dayabhai Tapidas v. Damodar Tapidas*, 1895, I. L. R. 22 B., 227 ; 21 B., 75 ; *Madhab Chunder Giri v. Bhayaram Panday*, I. L. R. 22 C., 92 ; also *Moti Bai v. Karsandas Narayandas*, I. L. R. 10 B., 123].

Citation under this section is compulsory, so that in the absence of such citation the grant will be revoked [*Digambar v. Narayan* (1910) 13 Bom. L. R. 38]. See *post*, secs. 50 (P) § 3 and 69 (P) § 7.

§ 4. **Corollary**—As a corollary to the above, a substituted executor [sec. 7 (P), § 6, *supra*] cannot propound the will until the first named executor, *i. e.*, the instituted executor, has been cited to accept or refuse the office (1). [*Smith v. Croft*, 2 Cas. temp. Lee 557 ; *Hormusji Navroji v. Bai Bhan Baiji*, I. L. R. 12 B., 164]. So if a person has two interests, a superior and an inferior one [*e.g.* being an executor and residuary legatee], the Court will not permit him to elect to take the grant in the inferior character. Similarly, an executor cannot be allowed to take out letters of administration *cum testamento annexo* [*In re Bullock*, 1 Rob. 273 ; *In re Richardson*, 1 Sw. & Tr. 515 ; *In re Morrison*, 2 Sw. & Tr. 129 (2)]. See sec. 17 (P), *post*

§ 5. **Renounce**—Executor must renounce. His consent is not sufficient [*Garrad v. Garrad*, L. R. 2 P. & D. 328]. The refusal of an executor must be recorded in Court [*Long v. Symes*, 3 Hagg. 775] before the grant is made to any other person (3). See sec. 17 (P), *post*.

Renunciation by legatee, effect of, see *supra* sec. 92 (s).

§ 6 “**Exception.**”—In such cases (*i. e.*, the cases contemplated by the ‘Exception’), the reason for citation not being necessary seems to be that, those who have not proved are held to have renounced. This seems to be in accord with the old practice of the Ecclesiastical Courts in England according to which “where there be many executors named and made, and, they being cited, some of them only do appear and refuse to accept it (the rest of the executors being then living) and after some or one of the rest of the executors prove the will, or take upon him the executorship ; in this case, and notwithstanding this refusal, they that do refuse may afterwards at any time, during the lifetime of their co-executors that did accept it, [or after the death of the acting executors] accept thereof, and intermeddle therewith as far forth as either of the rest * * * * *. And if one or more of the executors refuse, and the rest accept, if he or they which accept die before he or they that refused to accept ; it seems, in this case, they can never afterwards accept it, but the administration must be granted.” This point overruled (4).

§ 7. **Absence of citation, effect of**—See sec. 50 (P) § 3, *post*.

133. 17 (P).
194 (s).—The renunciation may be made orally in the presence of the judge, or by a writing signed by the person renouncing, and when

Form and effect of renunciation of executorship.

(1) Wms. 250 (m).

(2) Coote 215 ; Wms. 476 ; Tr. and Coote 232, 239.

(3) Coote 216 ; Tr. and Coote 233 ; Bro. P. P. 156 ; Walker and Elg. 57.

(4) Shep. T. 466-67 ; see Wms. 288-89.

made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

NOTES AND COMMENTARIES.

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| 1. <i>Renunciation by executor.</i> | § 3. <i>Renunciation by construction.</i> |
| 2. <i>Renunciation by administrator.</i> | § 4. <i>Effect of intermeddling.</i> |

§ 1. **Renunciation by executor**—*Renunciation* is the act whereby a person, having a superior interest or right to probate or administration, waives and abandons it. It must be made absolutely and without reserve; it takes effect from the day of its date [*Munday and Berry v. Slaughter*, 2 Curt. 72]. It is permanent and can be acted upon and referred to in all succeeding grants and no second renunciation is, therefore, required [*Harrison v. Harrison*, 1 Rob. 406]. It does not bind the representatives of the renouncing party. The renunciation may be made as soon as the testator is dead (1).

An executor cannot renounce after he has taken a grant of probate [*Re Veiga*, 32 L. J. P. M. & A. 9](a). Nor can he renounce in part. He must refuse or renounce entirely, or not at all [*Paule v. Moodie*, 2 Roll. Rep. 132; *Brooke v. Haymes* L. R. 6 Eq. 25].

(a) **Renunciation and discharge of executor.** There is no provision in this Act by virtue of which an executor, after he has taken out probate or intermeddled, may renounce or secure his discharge from his office, before the estate has been fully administered. It seems the law is in this respect, either unnecessarily rigorous or wanting in an important particular. The High Court of the Province concerned, may, however, under, section 4 of Act V. of 1902 remove or discharge an executor on grounds as such Court may think just and reasonable. It has, accordingly, been held by the Bombay High Court, that an executor may on his own application, be discharged by the Court if a proper case be made out. But an executor so discharged remains liable for anything he has done or left undone while an executor; such discharge only relieves him from the duties of his office from the date of the discharge. An administrator may also similarly be discharged (*Amerchand Medhowji Ex parte*. 1 L. R. 29 B., 188; 7 Bomb. L. R. 195).

It may be remarked that, it is not quite clear that the district Probate Courts can, under no circumstances accept the refusal of or discharge an executor, before he has fully administered the estate. It is reasonable to suppose that every Court of probate like other Courts has an inherent power to remove or discharge an executor whenever it may find sufficient reason for doing so. In *Habisabai v. Kasi Abdul Karim* (1 L. R. 19 B., 83) their Lordships of the Bombay High Court has laid down that an executor may be removed by the Court for gross misconduct. If that be so, does it not stand to reason that an executor may also be removed or discharged by the Court when he may happen to be disabled by illness, infirmity or otherwise?

The rule, therefore, that an executor cannot renounce after he has taken out probate or intermeddled, must not be regarded as an inflexible one. Sir E. V. Williams says: "There are some old cases in which it is laid down that, if an executor has once administered not only is he compellable to undertake the office if the Court desires it, but that the Court has no jurisdiction to accept his refusal and grant administration *cum testamento annexo* to another * * * But these cases were evidently decided while great jealousy of the Ecclesiastical Courts prevailed; and the law it should seem, is now taken to be that the Court may (though perhaps he ought not) accept the executor's refusal, notwithstanding he has administered."

(1) Tr. and Coote 232; Coote 216.

A testamentary guardian of a minor, or a committee of a lunatic or person of unsound mind, may renounce on behalf of his ward (1).

If an executor has intermeddled in his testator's estate, he will not be permitted to renounce, for, he may then be compelled to prove the will and take out probate [see *Ayeshabai v. Ebrahim*, I. L. R. 32 B., 364; 10 Bom. L. R. 117; *Rogrs v. Frank* 1 Y. & J. 409; *Re Stevens* (1898) 1 Ch. 162; *Re Coates* (1898) 78 L. T. 820]. (2). As to what is intermeddling, see sec. 45 (P), *post*.

The non-appearance to a citation of a party having a superior interest, is uivalent to renunciation (if he has been served with such process) (3). So 'ining to take' out probate amounts to renunciation [*Motibai v. Karsandas arayandas*, I. L. R. 18 B., 123].

Renunciation may be made by a letter to the judge, or even by parol [*Broker v. Charter* Cro. Eliz. 92; see *In re Boyle*, 3 Sw. & Tr. 426]. Renunciation by an agent duly authorized by a power of attorney, is also valid [*In re Rosser*, 3 Sw. & Tr. 490].

An executor may renounce, even if he agreed during the lifetime of the testator to accept the office (4). Nothing except taking out probate, or intermeddling, will preclude an executor from renouncing (5).

In England, a renouncing executor, may, at any time, before the grant of administration *cum testamento annexo*, retract his renunciation [*McDonnell v. Prendergast*, 3 Hagg. 212]. But such retraction can be made only when it is shown to be for the benefit of the estate, or of those interested under the will [*In re Gill*, L. R. 3 P. & D. 113; *In re Witham*, L. R. 1 P. & D. 303; *In re Noddings*, 2 Sw. & Tr. 15].

Following these cases, the Calcutta High Court granted probate to a sole executor who was alleged to have renounced [*In the Goods of Golap Sundari Dassi*, 5 C. W. N. clv.]. In that case renunciation was denied by the executor.

So it has been held, following *In re Golap Sundari Dassi* (*supra*), that mere expression of intention to renounce, by writing or otherwise, is not sufficient to preclude one from applying for probate. The renunciation must be formal regard being had to the provisions of this section. In other words, it must be made in the presence of the judge [*In re Manick Lall Seal* I. L. R. 35 C., 156].

A renouncing executor may subsequently obtain letters of administration *de bonis non*, under sec. 45 (P), *post* [*In re Mahkum Brahmanee*, 3 C. W. N. cccxxviii] or as attorney of other executors [*Re Russell*, L. R., I. P. & D. 635].

A person who renounces as executor cannot take representation in another character except by permission of the Court [*Re Rayner* (1908) 52 Sol. Jo. 226]. So a next-of-kin renouncing as such cannot take administration as creditor (6).

(1) Tr. and Coote 234; Coote 218, 219.

(2) Tr. and Coote 235, 363; Coote 219.

(3) Tr. and Coote 237; Coote 220.

(4) Wms. 278; Bro. P. P. 147.

(5) Tr. and Coote 236.

(6) *Ibid*.

But see *Re Toscani* [(1911) 46 L. J. 755; (1912) P. 1] where it was held that one renouncing as executor may obtain administration as creditor.

§ 2. **Renunciation by administrator.**—An administrator may also renounce [*West v. Wilby*, 3 Phill 375; *McDonnell v. Prendergast*, *supra*].

§ 3. **Renunciation by construction.**—Where a British subject died intestate leaving property and effects within the jurisdiction of the N. W. P. High Court and the Calcutta High Court, and his widow applied to the former High Court for letters of administration, but the same were not granted to her for want of the necessary security being furnished by her, and on her own application one G. H. K. was appointed administrator *protem*; it was held in the matter of the subsequent application of the Administrator General of Bengal for general letters of administration, that “the widow of the deceased had, in fact, abandoned the attempt to obtain letters of administration in her own name,” and that under such circumstance it was not thought necessary to order citations to issue [*In re Nechterlein*, (1868) 1 B. L. R. O. C. J. 19].

§ 4. **Effect of intermeddling.**—An executor who intermeddles may be compelled to take probate; but an administrator under similar circumstance, cannot be compelled to take letters of administration [*In bonis Fell*, 3 Sw. & Tr. 126] (1).

§ 5. **Form of Renunciation**—(a)

134. $\frac{18}{195} \frac{(P)}{(S)}$.—If the executor renounce, or fail to accept,

Procedure where
executor renounces
or fails to accept
within time limited.

the executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy.

(a) Renunciation in writing may be made in the following form (2):—

Whereas A. B. late of.....deceased, died on the..... day of.....19....., at..... having made and duly executed his last will bearing date the.....day of.....19....., and thereof appointed me, the under signed C. D., sole executor :

Now I, the said C. D. do hereby declare that I have not intermeddled in the property and credits of the said deceased, and will not hereafter intermeddle therein, and I do hereby renounce all my right and title to the probate and execution of the said will.

Signed by the said C. D. this.....day of } (Signed) C. D.
19.....in presence of

If there be codicils their dates should also be stated.

A similar form may be used where the renunciation is of administration.

(1) Tr. and Coote. 363, 12th. Ed; Wms. 280, 444.

(2) Tr. and Coote 293, 12th Edn; Powl. and Oakl. 802, 4th Edn.

NOTES AND COMMENTARIES.

- § 1. "Within the time limited...thereof." § 3a. *Effect of acceptance.*
 § 2. "Person who would be entitled...in- § 4. *Miscellaneous.*
 testacy." § 5. *Form of citation to accept or*
 § 3. *What acts amount to acceptance of refuse probate. (a).*
 the executorship.

§ 1. "Within the time limited for the acceptance or refusal thereof."—That is, within the time allowed by the Court in the notice or citation calling upon the executor to accept or renounce the executorship [*Motibai v. Karsondas Narayandas*, I. L. R. 19 B., 123].

The executor may renounce as soon as his testator is dead (1). There is no statutory limit of time within which the acceptance or renunciation is to be made. But it seems, there must not be any unnecessary delay. For, if there be any such delay the executor may be cited to accept or refuse probate. The time which the executor is allowed for deliberation as to whether he will accept the trust or not, or the time which must elapse before the issuing of the citation to accept or refuse, is in the discretion of the Judge. Much depends upon the nature of the estate to be administered. Sometimes it has been issued within the year, [Sec. 117 (P), *post*], sometimes within a month or two (2). In *Mordaunt v. Clarke*, [(1869), L. R. 1 P. & D. 592], the executor having neglected to take probate, though he had intermeddled, the Court issued citation and directed him to take probate within ten days (3).

Thus, although no period of limitation bars an application for probate, it is the duty of the executor to accept or renounce the executorship without the least possible delay after the testator's death. No executor or legatee can suppress the will with impunity. Nor is it optional with him to prove the will after any length of time from the testator's death, without rendering himself liable to give satisfactory explanation of the delay.

§ 2. "Person who would be entitled.....intestacy."—See section 23 (P), *post*.

In the Court of.....To C. D. of

(a) Whereas it appears by the petition of A. B. of .. filed in this Court on the day of 19... that C. D. late of ..., deceased, died on theday ofat.....,having made and duly executed his last will, bearing date .. (now remaining in the said Court), and therein appointed you sole executor (or sole executor and residuary legatee, or that you are one of the next of kin of the said deceased), and whereas it further appears by the said petition that the said A. B. is a legatee named therein:

You are hereby summoned to appear in this Court in person or by pleader, within days from the date of service hereof on you, and accept or refuse the probate (or letters of administration) and execution of the said will or show cause why the same should not be granted to the said A. B.

And take notice that in default of your so appearing this Court will proceed to grant administration of the estate of the said deceased to the said A. B. in your absence.

Given under my hand and the seal of the Court this... ..day of19 ..(4)

- (1) 14 L. of Eng. 143.
 (2) Walker and Elg. 17, 3rd Edn.
 (3) Powl. and Oakl. 102, 4th Edn.
 (4) Tr. and Coote. 719, 720.

§ 3. What acts amount to acceptance of the executorship.—

Any executorial act is acceptance; that is to say, anything done by the executor in relation to the effects of the testator which shows an intention to take upon himself the executorship, is an acceptance of the office. For further information see *post*, sec. 45 (P) §§ 7 and 8, and *ante* Sec. 128 (S).

An executrix failing to apply for probate, the residuary legatee applied for letters of administration with the will annexed; and the executrix being cited to accept or renounce the executorship on or before the 30th September 1890, stated that "she did not renounce her executorship, that she was already acting as executrix and administering the estate, and that she did not consider it necessary at that stage to take out probate having applied for a certificate under the Succession Certificate Act." The question was, whether the mere circumstance of declining to take out probate, amounted to renunciation or failure to accept the executorship. It was held, that this (*i.e.*, the application for certificate) was not such an acceptance as is contemplated by section 18 of Act V of 1881; and that, on the executrix declining to prove the will, the District Judge was right in granting letters of administration with the will annexed to the sole residuary legatee [*Motibai v. Karsondas Narayandas*, I. L. R. 19 B., 123].

§ 3a. Effect of acceptance.—If the executor accepts, his acceptance involves the acceptance of the trusts which the testator himself may have imposed upon him [*Stiles v. Guy* (1832), 4V and C. (Ex.) 571], or which in a Court of Equity are considered to arise from the office [*Re Marsden* (1882), 26 Ch. D. 783].

§ 4. Miscellaneous.—The person who cites another to appear in the Probate Court for any purpose, is called the "citant," and the person cited, the "citee," (1).

§ 5. Form of citation to accept or refuse probate.—See *supra*, p. 631, F. note.

135. 19 (P).
 196 (S) —When the deceased has made a will,
 but has not appointed an executor,
 or

Grant of administration to universal or residuary legatee.

when he has appointed an executor who is legally incapable or refuses to act, or has died before the testator, or before he has proved the will, or

when the executor dies after having proved the will, but before he has administered all the estate of the deceased,

a universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

NOTES AND COMMENTARIES.

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| 1. <i>The section.</i> | § 6. <i>Where Corporation aggregate an executor.</i> |
| 2. <i>Failure of appointment of executor.</i> | § 7. <i>Administration de bonis non.</i> |
| 3. <i>Universal legatee.</i> | § 8. <i>Miscellaneous.</i> |
| 4. <i>Residuary legatee.</i> | |
| 5. <i>Where grant to executor's nominee.</i> | |

§ 1. **The section.**—This section treats of cases where the deceased dies *quasi intestatus* (1), that is, when he appoints no executor, or the appointment of executor fails. The appointment of executor fails under the conditions mentioned in clauses 2 and 3 of this section. When, therefore, the deceased dies *quasi intestatus* the Court is to grant under this section what is called administration with the will annexed (*administration cum testamento annexo*). And in the last instance, that is, “when the executor dies after having proved the will, but before he has administered all the estate of the deceased” (clause 3), administration *de bonis non* must be granted [see sec. 45 (P), *post*].

§ 2. **Failure of appointment of executor.**—The appointment of an executor fails under the following circumstances (2) :—

(1) When the executor has renounced* or has failed to accept the executorship under section 18 (P) *supra*.

(2) When the executor is a minor or a lunatic, or resident beyond the jurisdiction of the Province in which the application is made [secs. 28 (P), 31 (P) and 33 (P), *post*].

(3) When the appointment of the executor is to take effect at a given period after the death of the testator and no executor is appointed to act in the meantime [*Graysbrook v. Fox* (1565) 1 Plowd pp. 279, 281].

(4) When the executor cannot be found [*Re Sawtell* 2 Sw. and Tr. 448].

(5) When there is a will containing a valid execution of a power, but not made in conformity with the laws of the testator's domicil [*Re Hunter* (1896) P. 209; *Re Vannini* (1901) P. 330].

§ 3. **Universal legatee.**—An *universal legatee* is a person to whom a testamentary disposition is made, giving him the whole of the property which the testator leaves at his decease (3).

An universal legatee is not entitled to probate, but only to letters of administration with the will annexed [*In re Shoshee Bhusan Banerjee*, I. L. R. 19 C., 582; *Pandit Prayrag Raj v. Goukaran Pershad Tewari*, 6 C. W. N. 787]. See sec. 7 (P), § 4, *ante*.

§ 4. **Residuary legatee.**—As to what constitutes a residuary legatee see sec. 89 (S), *ante*.

* Unless the executor renounces, his consent is not sufficient [*Garrard v. Garrard* (1871) 2 P. & D. 238].

(1) Wms. 468.
 (2) 14 L. of Eng. 194; Wms. 370, 19th Ed.
 (3) Wharton L. Lex.

The reason for the preference of the residuary legatee may be stated thus :—"The residuary legatee, inasmuch as his bequest can have no realization until all the debts, and all the other legacies have been paid, is influenced above all other legatees, if honestly inclined, in effecting a faithful and complete administration of the estate ; and inasmuch as the amount of his legacy is vague and uncertain until all the effects are got in, and the debts and legacies are paid, he feels in that a spur towards the settlement of the estate which can actuate no other legatee." "The residuary legatee," observes Sir J. Nicholl, "is the testator's choice ; he is the next person in his election to the executors" [*Atkinson v. Lady Anne Barnard*, 2 Phill. 317] (1)(a).

If there be several residuary or universal legatees, any one may take letters of administration without the consent of or notice to the others (2).

"If the residuary estate be given to one for life, and afterwards to another, the residuary legatee for life is entitled to the grant in preference to the residuary legatee substituted at his death ; but if he die or renounce, or, being cited, refuses, by non-appearance to the process, the grant will be made to the substituted residuary legatee" [*Brown v. Nicholls* (1852) 2 Rob. 399] (3).

Residuary legatee is to be preferred even when there is no present prospect of residue (4). For, an allegation that there is no residue might be made in every case and involve delay and expense.

So a residuary legatee is entitled although he may be a mere trustee having no beneficial interest (5) [*Hutchinson v. Lambert* (1825) 3 Add. 27].

If there be a residuary legatee who takes one portion of the residue absolutely and another such legatee takes the remaining portion for life, grant may be made to either indifferently according to priority of application (6).

A residuary legatee who is also a next-of-kin, is to be preferred to other residuary legatees [*Sawbridge v. Hill* (1871) 2 P. and D. 219].

A joint grant may be made to two or more residuary legatees, or to a residuary legatee for life and the remainder man, provided there is no other interested in the residue, except with the consent of such other (7).

Where the executor and residuary legatee perished in the same calamity, grant was made to the testator's widow [*Re Carmichael* (1863) 4 Sw. & Tr. 224].

In *In re Ponsonby* [(1895) P. 287] the executor being ill grant was made to the residuary legatee for life, for the use and benefit of the executor until his recovery.

(a) In an old English case the reason for preferring a residuary legatee was given in these words : "that the Stat. 21 Hen. VIII. required that administration should be granted to the next-of-kin, upon the presumption that the intestate intended to prefer him. But now the presumption is here taken away, the residuum being disposed of to another : and to what purpose should the next-of-kin have it, when no benefit can accrue to him by it ? And it is reasonable that he should have the management of the estate who is to have what remains of it after the debts and legacies paid" [*Thomas v. Butler* (1673) 1 Ventr 219].

(1) Tr. & Coote, 69 ;

(3) Tr. and Coote 67-68 ; Coote 68.

(4) Tr. and Coote 69 ; Coote 66.

(5) *Ibid.* 68 ; Coote 65

(6) Wms. 470 ; 8th Ed. ; 10th Ed. ; Mort, 848.

(2) Mort. 351.

On the principle that right to administration follows the right to property, administration may be granted to the assignee of the residuary legatee on the renunciation of the latter [*Re Pine* (1867) 1 P. and D. 388]. So, on the consent of the residuary legatee and on his renunciation, letters may be granted to his next-of-kin as having a *spes successionis* to the estate [*Re Hinckley* (1828) 1 Hagg. 477].

§ 5. **Where grant to executor's nominee.**—Where a sole executrix and universal legatee is incapable of taking probate owing to ill-health, grant of administration may be made to her nominee or nominees [*In re Davis* (1906) P. 330. *In re Roberts* (1 S. W. and Tr. 64) followed].

§ 6. **Where Corporation aggregate an executor.**—In such a case administration with the will annexed is to be granted to its syndic or attorney for the use and benefit of such corporation [*Re Hunt* (1896) P. 288].

§ 7. **Administration de bonis non.**—See sec. 45 (P), *post*.

§ 8. **Miscellaneous.**—The Probate Court may construe the will, in order to determine whether a certain person is entitled to letters of administration under this section. [*Arunmoyi Dasi v. Mohendra Nath Wadadar*, I. L. R. 20 C., 888]. See sec. 7 (P), § 9, *ante* and 53 (P) § 2 (d), *post*.

The grant of probate or letters of administration is no bar to maintaining a suit to establish one's title in respect of the property covered by such grant. The grant is intended for purposes of representation only for the administration of the deceased's estate [see *Arunmoyi Dasi v. Mohendra Nath Wadadar*, *supra*; *Jagannath Prasad Gupta v. Ranjit Singh*, I. L. R. 25 C. 354; *Behari Lall Sandyal v. Juggo Mohun Gossain*, I. L. R. 4 C., 1; *Lalitmohan Das v. Radharaman Saha* (1911) 15 C. W. N. 1021]. See *ante*, sec. 12 (P) § 1, and *post* sec. 23 (P), 55 (P) § 4, and sec. 59 (P) § 5.

136. $\frac{20(P)}{197(s)}$.—When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

Thus if an executor be also residuary legatee, and die before he has fully administered the estate, administration *cum testamento annexo* shall be granted to his personal representative and not to the next-of-kin of the testator (1).

But where the residuary legatee is a mere trustee, the practice is upon his death to grant the administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate (2).

(1) Wms. 373—374, 10th Ed.; Bro. P.P. 152.

(2) Bro. P. P. 152; Wms. 373—374, 10th Ed.; Mort. 352.

But no grant is to be made to the representative of a residuary legatee before all living persons having an interest in the residue, are cleared off either by renunciation or being cited. So where a share of the residue has lapsed, the representative of the legatee of the unlapsed share is not entitled to administration unless the next-of-kin and all persons entitled in distribution to the lapsed share renounce or are cited and thus cleared off (1).

"Survives the testator," that is, survives and thereby acquires a vested interest.

137. 21 (P).
198(s).—When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

Grant of administration where to executor, nor residuary legatee, nor representative of such legatee.

NOTES AND COMMENTARIES.

§ 1. *Rules of priority to be observed.*
§ 2. *General rule in granting letters.*
§ 3. *Creditor.*

§ 4. *Grant is discretionary.*
§ 5. *Grant to Administrator-General.*
§ 6. *Grant to a stranger.*

§ 1. **Rules of priority to be observed.**—In all cases contemplated by this section, a party having a prior title to a grant, must be cited before administration is committed to any other person. "Therefore the executor, if there be one, must be cited before a grant to a residuary legatee, a residuary legatee before a grant to a specific legatee, and so on, through all the gradations of priority" (2). See sec. 16 (P), *supra* § 2.

§ 2. **General rule in granting letters.**—In granting letters of administration the general rule is to consider which of the claimants has the greatest interest in the effects of the deceased. That is to say, "the Court follows the beneficial interest;" in other words, the right of administration follows the right to the property (*Re Gill* 1 Hagg. 341), the governing principle being that the person most beneficially interested under the will shall have the preference [18 cyclo. Am. 99, 2.] Hence the provision for "any other legatee having a beneficial interest." See sec. 46 (P) § 2, 69 (P) § 6, *post*.

(1) Wms. 372, 10th Ed.

(2) Wms. 474.

Where the claimants were the testator's widow and his sister, the Court preferred the sister as it appeared that she, as a legatee, had the larger interest in the property to be distributed [*Re Homan*, 9 P. D. 61].

So if the residuary legatee declines, it is usual to grant administration with the will annexed to the next-of-kin. But when the next-of-kin has no interest, he may be excluded and the administration granted to a "creditor" who is a person having an interest in the estate of the deceased. Thus where the deceased left a widow and a son, and the widow was the sole executrix and universal legatee, and she renounced probate, administration was granted to a creditor in preference to the son, the estate being insolvent [*Furlonger v. Cox*, cited in 3 Phill. 381].

§ 3. Creditor.—The right of a creditor rests on the ground that he cannot be paid his debt until representation to the deceased is made; and therefore, administration is granted to him every other representative failing. "When a creditor applies for administration, the necessary course is, to issue a citation for the next-of-kin in particular, and all others in general, to accept or refuse letters of administration, or show cause why administration should not be granted to such creditor"(1). In every case, therefore, where a creditor applies for letters of administration, no matter whether the deceased died testate or intestate, the Court should invariably issue citation calling upon the next-of-kin to take out letters or show cause why administration should not be granted to such creditor. [See *In the goods of Beejraj Fathay Chand*, 10 C. W. N. lviii].

Where the debts of the deceased are in excess of the assets (see sec. 108, Act III of 1909-Insolvency Act), application in the Insolvency Court is not the only remedy of the creditor. He is entitled to letters of administration also under this Act [*Re Makhan Lal Chatterji* (1911) 15 C. W. N. 350]. See *infra* § 4 last para & sec. 22 (P) § 2.

From the fact that an executor or administrator may retain his own debt [sec. 104 (P) § 5, *infra*] although barred, it seems to follow that the creditor of an intestate is entitled to a grant of administration even where his right of action is barred by limitation [*Coombs v. Coombs* (1867) L. R. 1 P. & D. 288].

§ 4. Grant is discretionary.—From the fact that, grant follows the interest, and that the main object of the grant is the protection and benefit of the estate, it follows (and that has been the practice in England) (a) that the Court is not bound to grant administration to any particular individual, whether a residuary or any other legatee, a next-of-kin, or a creditor. "The grant being thus discretionary, no party is of right entitled to it;" and "though it is a good general rule to grant administration to the largest interest, yet that is only introduced by practice, and not by any positive law, and the Court is not obliged to grant it to the largest interest." [*Cardale v. Harvey*, 1 Lee. 179, 180] (2). See *post* sec. 46 (P), § 2.

(a) *Origin of the practice in England.*—Many of the cases arising from the failure of appointment of executors are not within the Statute of Administration (21 Hen VIII c. 5). "Consequently in such instances the Court is left to the exercise of its discretion in the choice of an administrator." This discretion of the Court has been of late confirmed by Parliament and it is now governed by Statute 20 and 21 Vic. c. 77, sec. 73 (3).

(1) Wms. 446, 8th Ed.; 351. 10th Ed.

(2) Elg. 58; Wms 469-70; Tr. & Coote 73-74, 213; Bro. P.P. 150-51; Coote 201.

(3) Wms. 469-70; Walker and Elg. 57-60; Tr. & Coote. 73-74 Bro. P.P. 150-51.

The principle has been followed in this country. In *In the goods of Duncan* (1 B. L. R. O. C. J. 3), Mr. Justice Phear said :—"At the same time the Court undoubtedly has a discretion in the matter. It will, if it sees any chance of the grant leading to confusion, or to the creation of conflicting titles which would end in needless litigation, refuse to grant letters of administration, or to grant them on terms so as to avoid such a result. In England the Court does not always feel itself obliged to grant the probate or letters of administration to the person who has the best right. This is a case in which there is risk of the kind I have just suggested." [See *In the goods of Nechterlein*, 1 B. L. R. O. C. J. 19].

In a contest between creditors, the Court will prefer one having a judgment debt [*Lord Carpenter v. Shelford*, 2 Lee. 503], or a debt of a larger amount [*Kearney v. Whittaker*, 2 Lee. 325] than the other creditors can show (1).

Where two next-of-kin, or two residuary legatees contend, both being legally unobjectionable, the Court will prefer the one "who is a man of business to the other who is not." [*Williams v. Wilkins*, 2 Phill. 100] (2).

§ 5. Grant to Administrator-General.—If no such person as is entitled to administration under this section [or section 19 (P) *ante*], appear and take out letters of administration, or if a person entitling himself to such administration neglects to give such security as may be required of him under the law or the practice of the Court, the Court shall grant letters of administration to the Administrator-General of the Presidency, according to the provisions of Act III of 1913 (The Administrator-General's Act). See the Act in the appendix.

The administrator-General of the Presidency shall be deemed by all Courts in the Presidency to have a right to letters of administration other than letters *pendente lite* in preference to that of a creditor, a legatee other than an universal legatee, or a friend of the deceased. See sec. 15 Act. II. 1874 corresponding to sec. 8 of Act III of 1913, the new Administrator-General's Act.

Under section 15, Act II, 1874, the Administrator-General is entitled to letters of administration to the estate of an illegitimate person dying intestate [*De Mello v. Broughton*, 11 B. L. R. App. 6].

Or the grant may be made to a receiver (if any appointed by the Court) [*Re Moore* (1892) P. 145], or even to a stranger [*Re Jackson* (1892) P. 257].

But no grant should be made under this section unless the exigency is made apparent [see *Re Buller* (1898) P. 9; *Re Ponsonby*, (1895) P. 287]. Thus where it was found that the executor was bodily incapacitated by illness temporary letters were granted to a residuary legatee for the use of the executor until his recovery [see *Re Ponsonby*, *supra*].

§ 6. Grant to a stranger.—If those entitled to administration renounce, the grant will be made to a stranger [see *Re Hastings*, 4 P. D. 73; *Re Trigg* (1901) P. 42; see also *Re Roberts* (1898) P. 149; *Re Bolton* (1899) P. 186; *Whitehead v. Palmer*, (1908) 1 K. B. 151].

(1) Tr. & Cotte 214.

(2) Tr. & Cotte 213; Cotte 200; Walker and Elg. 47; Wms. 433.

138. 22 (P)
199(s)

Citation before grant of administration to legatee other than universal or residuary.

Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

NOTES AND COMMENTARIES.

§ 1. *Next-of-kin.*

§ 3. *Where the will is inoperative.*

§ 2. *Citation, when creditor applies.*

§ 1. **Next-of-kin.**—There is no definition of this expression in this Act. The definition given in the Administrator-General's Act (Act III of 1913) runs as follows :—

"Next-of-kin" includes a widower or widow of a deceased person, or any other person who, by law would be entitled to letters of administration in preference to a creditor or legatee of the deceased.

"Next-of-kin" "is sometimes construed to mean next of blood, or nearest of blood, and sometimes only those who are entitled to take under the Statute of distribution, and sometimes to include other persons" (1). "The authorities are distinct," says V.-C. sir W. P. Wood, L. J., "that a limitation to next-of-kin *simpliciter*, whether it be contained in a will or settlement, is a limitation to the person nearest in blood to the *propositus* or person from whom it is proposed" [*Hatton v. Foster* (1868) L. R. 3 Ch. 505; *Harris v. Newton* (1877) 46 L. J. Ch. 268] (2). See "Kindred" in sec. 20, Succession Act and *supra* sec. 99 (S) § 12.

§ 2. **Citation, when creditor applies.**—This section provides for the issue of citation only when the applicant is a legatee other than an universal or a residuary legatee.

Formerly, *i. e.*, before the Hindu Wills Act and the Succession Act, letters of administration could be granted to Hindus only on the consent of all the next-of-kin. Thus, the principle of citation was always observed. [*In re Sumboo Chunder Mitter*, 1 Taylor and Bell, 39] (3):

§ 3. **Where the will is inoperative.**—Where the will has become inoperative, administration may be granted as under an intestacy, and without any citation on the executor named in the will. [See *In the goods of Elizabeth Graham*, L. R. 2 P. & D. 385; *In the goods of Shapoorjee Framjee Mehta*, 5 C. W. N. cxlvii] (4). See next section.

(1) Story, Eq. Jur. § 1065 b., citing *Witby v. Mangles*, 10 Clark and Finnel, 215.

(2) Flood, 698 (w).

(3) 1 Morl. Dig. 165.

(4) Tr. and Coote 97, F. note.

139. **23 (P)**.—When the deceased has died intestate,
200-207 (S)

To whom administration may be granted [in case of intestacy].

(a) administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

When several such persons apply for administration, it shall be in the discretion of the Court to grant it to any one or more of them.

When no such person applies, it may be granted to a creditor of the deceased.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 5. <i>Title need not be inquired into.</i> |
| § 2. <i>"When several such persons apply."</i> | § 6. <i>Court's jurisdiction under this section.</i> |
| § 3. <i>Court's power to associate uninterested party.</i> | § 7. <i>Administration to Hindu heir.</i> |
| § 4. <i>Rules for the distribution of, &c.</i> | § 8. <i>Where grant to be refused.</i> |

§ 1. **The section.**—This section does not correspond to any particular section of the Indian Succession Act, but it treats of the matter comprised in sections 200 to 207 of that Act, and prescribes rules for the determination of the persons to whom letters of administration may be granted in cases of complete intestacy. The rules prescribed by sections 200 to 207 of the Indian Succession Act are not applicable to those classes of persons for whom the Probate and Administration Act (or the Hindu Wills Act) is intended. Sir Whitley Stokes says: "The only rule it seems possible to lay down for these classes is the broad one that the grant shall follow the interest; that, when several persons inheriting portions of the estate claim administration, the judge may grant it to any one or more of them as he thinks fit, and that when no such person applies, he may grant it to a creditor." (Statement of object and reasons for Act V. of 1881).

§ 2. **"When several such persons apply."**—The Court always prefers a sole administration to a joint administration [*Warwick v. Greville*, 1 Phill. 126]. And acting upon this rule it grants administration *priori patenti*, i. e., to that next-of-kin or residuary legatee who first applies [*Cordeux v. Trasler*,

(a) See sec. 25 (s) Succession Act. A testator who creates a life estate and does nothing more, that is, leaves a remainder undisposed of, cannot be said to die intestate as regards such remainder within the meaning of this section. [See *Mahim Chandra Maulik v. Sarafudala Ghosh* (1909) 2 C. L. J. 576].

4 Sw. & Tr. 51] (1). Under special circumstances, however, joint administration may be granted [*In the goods of Dalton*, Tr. and Coote. Pro. Pra., 210; *In the goods of Richardson*, L. R. 2 P. & D. 244].

§ 3. Court's power to associate uninterested party.—On an application for letters of administration to which the applicant is legally entitled under this section, the Court has no power to order, under section 41 (P), *post.*, that another person who has no present interest in the estate, should be associated with the applicant in the grant. [*Annapurna Dasi v. Kallayani Dasi*, I. L. R. 21 C. 164]. In that case their Lordships (Ghose and Gordon JJ.) said : "Under section 23 of the Act, letters of administration should be granted to such persons who, according to the rules for the distribution of the estate of an intestate, would be entitled to the whole or any part of the estate."

§ 4. Rules for the distribution of.....intestate.—There are no rules of distribution according to Hindu Law. Under that law there are rules of succession and inheritance, which differ materially from *distribution* in the sense in which the term is used in English law. See sec. 29, Indian Succession Act, Majumdar's edition.

In *The Secretary of State v. Jagat Chundra Goswami*, [I. L. R. 28 C., 608 ; 5 C. W. N. 873], the preceptor's preceptor of a *Bairagi* or an ascetic, was held to be entitled to letters of administration, there being a custom to that effect.—See Hindu Law.

1. Devolution of Shebaitship.—Where there is no provision in the deed of endowment for the devolution of the office of shebaitship, the Court will not read into the deed a provision for the appointment of a shebait. The principle applicable in such circumstance is threefold, namely.—

(1) The devolution of the trust upon the death or default of each trustee depend upon the terms under which it was created, or the usage of the particular institution where no trust-deed exists.

(2) Where the worship of an idol is founded the office of shebait is vested in the heirs of the founder in default of evidence to show that he disposed of it otherwise.

(3) Where a shebait appointed by a founder fails to nominate his successor in accordance with the condition or usage of the endowment, the management reverts to the representatives of the founder, even though the endowment has assumed a public character [*Raj Krishna Day v. Bipin Behari Day* (1912) 17 C. W. N. 591 ; 17 C. L. J. 189 ; 40 C., 251 ; see *Sital Das Babaji v. Pratab Chandra Sarma* (1909) 11 C. L. J. 2 ; *Goswami Sri Gridhorji v. Roman Lalji Goswami*, I. L. R. 17 C., 3 ; L. R. 16 I. A. 137].

In appointing a new trustee or shebait, the Court should be guided by the following rules formulated by Lord Justice Turner in *In re Tempest* [(1866) L. R. 1 Ch. App. 485]:—

(i) The Court will have regard to the wishes of the person by whom the trust was created, if expressed in the instrument creating the trust or clearly to be collected therefrom.

(ii) The Court will not appoint a trustee with a view to the interest of some of the persons beneficially interested under the trust in opposition either to the wishes of the founder or the interests of the other *cestui que trusts*.

(iii) The Court in appointing a trustee will have regard to the question, whether the appointment will promote or impede the execution of the trust, for, the very purpose of the appointment is that the trust may be better carried into execution [*Raj Krishna Day v. Bipin Behari Day, supra*].

2. Succession to property left by Hindu out-castes or prostitutes.—This is governed by the rules of Hindu Law; for, those who can trace their origin to Hindu parents, do not cease to be Hindus by their degradation [*Sarnamoyi Bewa v. Secretary of State for India*, I. L. R. 25 C., 254; 2 C. W. N. 97; *Narayn Das v. Tirlok Tewari*, I. L. R. 29 A., 4; *Subbaraya Pillai v. Ramasami Pillai*, I. L. R. 23 M., 171; *Mynabai v. Ulluram*, 8 Moo. I. A. 400].

In cases, however, where the question is between a degraded woman and a member of her natural family, or her husband's family, the rules are conflicting. The view invariably held by the Calcutta High Court is to the effect that, degradation of a woman in consequence of her unchastity, severs the tie of kindred between her and the members of her natural family as well as those of her husband's family, so that, no such member can claim any interest in the estate of a deceased prostitute by right of inheritance (a) [*Taramunnee Dassee v. Muttee Buneanee*, 7 Sel. Rep. 273; *In re Kaminey money Bewa*, I. L. R. 21 C., 697; *Sarnamoyi Bewa v. The Secretary of State for India, supra*; *Bhutnath Mondal v. The Secretary of State for India*, 10 C. W. N. 1085]. But the Madras and Allahabad High Courts are of opinion that no such severance is effected by such degradation [*Subbaraya Pillai v. Ramasami Pillai, supra*; *Narain Das v. Tirlok Tewary, supra*]. It is noticeable, that the Madras High Court in some earlier cases followed the view held by the Calcutta High Court. [See *Sivasangu v. Minal*, I. L. R. 12 M., 277; *Narasanna v. Gangu*, I. L. R. 13 M., 133].

But the rules governing grant of letters of administration to the estates of persons dying intestate, are not always the same as those governing the distribution of their assets. Accordingly, prostitutes having died intestate, letters of administration have been granted to the members of their natural family [*In re Kaminey Money Bewa, supra*; *Re Sowdaminey Dassee* (unreported—decided 28th April, 1893); *In re Parbutty Dassee*, 1 C. W. N. cxiv.]. These grants were made “not as recognising any legal interest of the grantees in the estate of the deceased persons,” but in the exercise of the discretionary power of the Court under sec. 41 (P), *post*.

§ 5. Title need not be inquired into.—It is not the practice of the Probate Court to go into the question of title, or whether the property left by a deceased was joint or separate. Hence the bare allegation of a widow governed by the *Mitakshara*, that there was separate property left by her

(a) In the very recent case of *Tripura Charan Bannerjee v. Harimati Dassi* [(1911) 38 C. 493; 15 C. W. N. 807], it was held by the Calcutta High Court that property absolutely held by a prostitute (however acquired) should be treated as her *Stridhan* for purposes of succession; and that for such purposes her degradation does not sever her from her sons and daughters born after such degradation. Nor does it sever her from her kindred by blood [*Hiralal Sinha v. Tripura Charan Ray* [(1913) 40 C., 650, F. B.; 17 C. W. N. 679; 17 C. L. J. 438]. Thus in the absence of nearer heirs her brother's son succeeds to her *Stridhan* [*Ibid*].

husband, was held to be sufficient to entitle her to letters of administration [*In the goods of Raghubar Hazam v. Bahadoor Hazam*, 3 C. W. N. cclxxvii followed in *Raghu Nath Misser v. Pate Koer*, 6 C. W. N. 345; *Ochavaram Nanabhai Haridas v. Dolatram Jameatram Nanabhai*, I. L. R. 28 B., 644; see *Mohun Pershad Narain Singh v. Kishen Kishore Narain Singh*, I. L. R. 21 C., 344]. See sec. 69(P), § 6, *post*.

For the same reason the Court will not enter into the question whether the property was *Joutuka Stridhan* or any other *Stridhan* [*Nishi Kant Chatterjee v. Ashutosh Mukherjee* (1913) 17 C. W. N. 613].

§ 6. Court's jurisdiction under this section.—The Court under this section is competent only to determine the question of representation, but it is not competent, as seen above, to determine any question of title in respect to the properties involved, as for instance, whether the applicant is entitled to letters as an heir by right of inheritance. The Court may, however, incidentally try such question, but the decision will not be conclusive [*Lalit Mohan Das v. Radharaman Saha* (1911) 13 C. L. J. 547; 15 C. W. N. 1021; See *Nishi Kant Chatterjee v. Ashutosh Mookerjee*, *supra*].

The jurisdiction of the Court under this section is special [*Lalit Mohan v. Radharaman*, *supra*]. See *infra* sec. 55 (P) § 4.

§ 7. Administration to Hindu heir.—A Hindu heir is not bound to obtain letters of administration for administering the estate of his predecessor when he dies intestate; he cannot therefore be compelled to take out letters of administration [*Jogendra Chandra Dutt v. Apurna Dassi*, 13 C. W. N. 1190]. The Succession Certificate Act is based upon this view of the Law.

§ 8. Where grant to be refused.—Where the object of the application is not to administer the property of the deceased intestate, but to obtain a declaration of heirship for future litigation, no grant should be made [*Lalit Chandra Chowdhury v. Baikuntha Nath Chowdhury* (1910) 14 C. W. N. 463]. So also where the object is simply the management of the deceased's property [see *Parsania v. Hari Charan Das* (1912) 17 C. L. J. 65; *Prosonno Kumari Debi v. Ram Chandra Singh Deb* (1912) *Ibid*, 66].

So it seems, no letters are to be granted under this section in cases where the deceased left no unliquidated debts due by him [*Re Harrydass Banerjee* (1878) 4 C., 87]. If debts are due to the estate of the deceased, Succession Certificate is enough. See sec. 85 (P), *post*.

CHAPTER III

-:O:-

OF LIMITED GRANTS.

INTRODUCTORY NOTES.

This is Part XXX of Act X of 1865. It treats of limited grants of administration, viz., (a) grants limited in duration; (b) grants for the use and benefit of others having right; (c) grants for special purposes; (d) grants with exception; (e) grants of the rest; (f) grant of effects unadministered, and supplemental grants.

In the forms of grant described in the preceding sections (*i.e.*, general and special grants of administration), the powers given to the grantee extend over the whole estate of the deceased, and terminate only with the life of the grantee. But cases also occur where the circumstances are such as not to warrant the Court in making a permanent grant, or where the title of the applicant itself, though general, is not absolute or unqualified, and a necessity is consequently imposed upon the Court to give to the grant a corresponding modification, while, at the same time, the power of collecting and administering is conferred as extensively as in the instances first mentioned. The form of limitation in these grants is of time or duration only, a certain period or condition being specified at or upon which the grant ceases and determines. In all other respects the grant is general and unfettered.

"There are cases where the applicant's interest is of so limited a nature as to give no title to the administration of the deceased's estate beyond a particular portion. In any one of these cases the Court, while it grants to such person probate or administration, must limit the power of the grantee to his interest, and so exempt the general estate from his intermeddling. In such cases the property to which the grant is limited may be either the deceased's own effects, or his legal interest merely in the estate of another person."

"There are cases also of a close affinity to the grants last described, where the interest of the applicant is confined to making or continuing the deceased as a party in a law-suit. In such cases, the Court will grant to a nominee of the applicant an administration limited to the purposes of the suit."

"In grants of these descriptions, the representation of the deceased, though perfect so far as it extends, is only fragmentary as regards the entire succession, and other grants will be required to fill up and perfect the deceased's representation" (1).

According to the limit and scope of representation, *limited grants* may be classified as follows (2). :—

(1) Tr. & Coote 126-27.

(2) Bro. P.F. 181, 183, 194.

1. Grants limited in estate—

- (a) As to trust or other particular fund [sec. 37 (P)];
 (b) Grant *de bonis non* [sec. 45 (P)].

2. Grants limited in time, such as,

- (a) Till a will be found [sec. 24 (P)];
 (b) *Durante absentia* [sec. 28 (P)];
 (c) *Durante minore ætate* [sec. 31 (P)];
 (d) *Durante dementia* [sec. 33 (P)];
 (e) *Pendente lite* [sec. 34 (P)].

3. Grants limited to a particular object, as for instance,

- (a) *Ad litem* [sec. 38 (P)];
 (b) To collect the goods of the deceased, *ad colligenda bona* [sec. 40 (P)];
 (c) "Save and Except" [secs. 42 (P), and 43 (P)];
 (d) *Ceterorum* [sec. 44 (P)];
 (e) Supplemental [sec. 47 (P)].

The classification adopted in this Act, substantially agrees with the above, and seems to have been mostly taken from Coote's "Common Form Practice." (See Tr. and Coote, Ch. VI).

In regard to grants of this class the general practice is, not to make a limited grant to a person who is entitled to a general grant; nor general grant to one who is entitled to a limited grant [*In re Dodgson*, 1 Sw. & Tr. 260] (1). Thus, probate limited to a part of the estate cannot be granted in cases where under section 4 (P), *ante*, the whole estate of the deceased is vested in the executor [*In re Thaker Madhavji*, 1 L. R. 6 B., 460]. Limited probate, may, however, be granted where the testator has limited the executor [*Sutton v. Smith*, 1 Lec., 280; *Davies v. Queen's Procter*, *Ibid*, 413; see also *In re Dodgson*, *supra*] (2). But it is not to be granted unless every one entitled to the general grant has given his consent or renounced, or has been cited and failed to appear, except where the judge otherwise directs (3).

(a)—Grants limited in Duration.

140. $\frac{24}{208}$ (P) (s).—When the will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will

Probate of copy or
draft of lost will.

(1) Wms. 529; Bro. P.P. 180; Hayne's L. C. 358.
 (2) Wms. 387; Walker. & Elg. 32.
 (3) Walker. & Elg. 39.

has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced.

141. $\frac{25 (P)}{209 (S)}$ —When the will has been lost, or destroyed, and no copy has been made nor the draft preserved, probate may be granted of its contents, if they can be established by evidence.

NOTES AND COMMENTARIES.

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| 1. "Destroyed." | § 5. <i>Probate of a copy or draft and of contents.</i> |
| 2. <i>Presumption of revocation.</i> | § 6. <i>Probate of a portion of a will.</i> |
| 3. <i>Procedure.</i> | § 7. <i>Interpretation of section 25 (P).</i> |
| 4. <i>Evidence.</i> | § 8. <i>Miscellaneous.</i> |

§ 1. "Destroyed."—"Destroyed" means destroyed after the testator's death, or in his lifetime, by another person without his consent, or by himself without intention (1).

§ 2. **Presumption of revocation.**—It is to be remembered that, if a will be lost or destroyed during the lifetime of the testator, and no other be executed by him, and if no will be forthcoming at his death, the presumption will be that he himself destroyed it *animo revocandi* (2). Or if a will, shewn to have been in the custody of the testator, is not forthcoming at the time of his death, the presumption is that the testator destroyed it himself [*Sugden v. Lord St. Leonards* (1876) L. R. 1 P. and D. 154; *Anwar Hossein v. Secretary of State for India*, 1 L. R. 31 C., 885; 8 C. W. N. 821; *Brown v. Brown*, 8 E. and B. 882]. So that, in the one case the presumption is of *animo revocandi*, and in the other of destruction merely. But these presumptions are rebuttable and evidence is admissible to show that the testator did not destroy it with the intention of revoking the same [see *Allan v. Morrison*, L. R. (1900) A. C. 604] (3). In a case, therefore, where the will has been lost or destroyed during the lifetime of the testator, it seems, no probate will be granted to the executor under either of these sections, before that presumption is rebutted [see *Kedar Nath Mitter v. Sorojini Dassi*, 1899, 3 C. W. N. 617.] See sec. 57 (S), *ante*, p. 168, § 34.

But this presumption will not arise unless there is evidence to satisfy the Court that the will was not in existence at the time of the testator's death [*Anwar Hossein v. The Secretary of State for India*, *supra*; *Finch v. Finch*, L. R. 1 P. and D. 371]. It must also appear that search was made for the

(1) Coote 123; Tr. and Coote 128; see Stokes. 145.

(2) Tr. and Coote 455; Bro. P. P. 83, 25; Wms. 150, 160.

(3) Wms. 150; Bro. P. P. 83, 95; Tr. and Coote 355.

will by some responsible person, and it was not forthcoming at the testator's death [*Shib Sabitri Prasad v. Collector of Meerut*, I. L. R. 29 A., 82]; and further, that there are circumstances leading to the conclusion that the testator had reason to change his mind and alter the sentiments expressed in his will [*Anwar Hossein v. The Secretary of State for India*, *supra*; *Sugden v. Lord St. Leonards*, L. R. 1 P. and D. 154]. In *Anwar Hossein's* case, *supra*, the presumption was not raised [see *Sarat Chandra Basak v. Golap Sundary Dasya* (1913) 18 C. W. N. 527].

It has been ruled by the Madras High Court that, where a will is shown to have been in the possession of the testator some time before his death, but is not found at the time of his death, no presumption of revocation will arise [*Chidambaram Pillai v. Swaminatham*, 13 M. L. J. 135; see *Shib Sabitri Prasad v. Collector of Meerut*, *supra*].

It is not necessary under this section to prove that the will was in existence up to the time of the testator's death. [See *Sarat Chandra Basak v. Golap Sundary Dasya*, *supra*].

A testatrix made a will on the 19th May, 1898. It was duly executed and kept in her own custody, the draft being left with her solicitors. On 8th July, 1901, she made another will, but it was not duly executed, one witness only having attested it. In May, 1902, the testatrix died, and though search had been made the first will could not be found. Under these circumstances the executors claimed to have the draft of the first will proved in solemn form. The application being opposed on several grounds, it was held that from all the circumstances of the case the proper inference to draw was that the testatrix having thought that she had made a valid will in 1901, she destroyed the first will, of which the draft was, accordingly, admitted to probate [*Powell v. Settle* 8 C. W. N. clxxi]. See *infra*, § 5.

§ 3. Procedure.—In *Iswar Chandra Surmah v. Doyamoyi Debi* [I. L. R. (1882) 8 C., 864; 11 C. L. R. 135], the application was for letters of administration with the will annexed. The defendant's plea was that the will had been destroyed by the testator's directions. The petition was accompanied by a copy of the will. The High Court (White J.) in remanding the case to the Original Court for retrial, gave the following directions as to the procedure to be followed in such cases :—

(i) The first question to be determined is, whether there was a will of the testator in existence at his death. If it be found there was such a will, it shall be ordered to be produced, and when produced, administration is to be granted according to its provisions.

(ii) If there was no such will, the Court is to consider whether it had been destroyed by the testator, or by his orders with the intention of revoking it. If this question be decided in the affirmative, the petition is to be dismissed. But if in the negative,

(iii) the Court is to determine whether the annexed copy of the will is a true copy, and then pass orders according to its finding—granting administration with the copy annexed, or otherwise.

§ 4. Evidence.—‘Evidence’ [in sec. 25 (P)] includes parol evidence. The validity of the execution as well as the substance or contents of the will are to be proved [*In bonis Gardner*, 1 Sw. & Tr. 109] (1) by witnesses who “must

be the subscribed witnesses, or the drawer and writer, or persons who have read the will and have made themselves cognizant more or less of its tenor. Proof or vehement presumption must be adduced that the will was in existence after the testator's death; or, if that cannot be shown, that it is impossible that the testator could have himself destroyed it, or caused it to be destroyed" (1).

Where the will has been destroyed in the lifetime of the testator, it must be proved that the destruction was caused by mistake or without his privity or consent [*Davies v. Davies*, 2 Add. 224] (2).

§ **Probate of a copy or draft and of contents.**—Where an executor applies for probate of a copy or draft of a will lost since the death of the testator, he must prove—(a) the due execution of the original will; (b) that it was in existence since the testator's death and has been lost; and (c) that the copy is a true one (3) (a).

As to proving the contents of a lost will the latest leading case is that of *Sugden v. Lord St. Leonards* (4) (L. R. 1 P. & D. 154).

Sugden v. Lord St. Leonards. The result of this case, so far as it concerns lost wills, are shortly the following:—

(i) The contents of a lost will, like those of any other instrument, may be proved by secondary evidence.

(ii) Declarations written or verbal made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents. (b) [See *Woodward v. Goulstone*, 11 App. Ca. 469; *Atkins v. Morris* (2891) P. 40; *Eyre v. Eyre* (1903) P. 131; *Clark v. Turner*, 2 C. W. N. cxcix].

(a) Where the applicant is unable to produce the will or any copy or draft of it, or any written evidence of its contents, he is bound to prove its contents and its due execution and attestation by evidence which is so clear and satisfactory that it removes, not all possible, but all reasonable doubts on those points [*Harris v. Knight* (1890) 15 P. D. 170, 179]. "If he succeed in establishing an intention on the part of the testator to do some formal act, and the evidence is consistent with that intention having been carried into effect in a proper way, the Court may infer the actual observance of all due formalities as a matter of probability [*Harris v. Knight, supra*] (5).

As a general rule the Court requires the lost will to be proved in solemn form, before admitting it to probate, even where there is a draft or copy of it in existence [*Re Barber, infra*; *Re Estate of Carter* (1908), 52 Sol. Jo. 600]. But where the case is clear, proof in solemn form may be dispensed with, with the consent of all parties interested under an intestacy [*Ibid.*]. And where the estate is small such consent even may be dispensed with [*Re Apted*, (1899) P. 272; see *Re Brassington*, (1902) P. 1].

Where the contents of a lost will have to be proved by parol evidence, probate may be granted of an affidavit of scripts filed in the case, or of the deposition of a witness. In *Lord St. Leonard's* case, the Court granted probate of the declaration which pleaded the contents (6). Probate may also be granted of a press copy of a copy of the will [*Lafone v. Griffin* (1909), 25 T. L. R. 308].

(b) But the question seems to be still unsettled. See the point discussed in *Wms.* 264-267, 10th Ed.

(1) *Stokes*, 145; *Coote* 93.

(2) *Wms.* 384; *Hend.* 333.

(3) *Bro. P. P.* 223; *Tr. and Coote* 127.

(4) *Bro. P. P.* 127; *Coote* 124; *Tr. and Coote* 128; *Wms.* 386; *Theob.* 42, 43, 3rd Edn.; 49, 50, 5th Edn.

(5) 14 L. of Eng. 160.

(6) *Tr. and Coote* 129.

(iii) The contents of a lost will may be proved by a single witness even though interested, whose veracity and competency are unimpeached. But the Court must exercise its jurisdiction with the greatest possible caution; and a judge will scarcely feel justified in acting on the evidence unless it be of the most gent and irrefragable character,—not only free from suspicion in its source, but exact and certain in its conclusions [*Wharram v. Wharram*, 3 Sw. & Tr. 301; *Re Barber*, L. R. 1 R. & D. 267; *Podmore v. Whatton*, 3 Sw. & Tr. 449].

(iv) When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved (1). See *Kedar Nath Mitter v. Sorojini Dassi*, 1899, 3 C. W. N. 617.

A solicitor prepared a draft and a will for the testator, one Mr. Thornton, and keeping the draft in his own custody, handed the will to the latter, who was soon after removed to an asylum his mind having given way, where he died. Just before he was removed he was seen to throw the will into the fire when some one present picked it out, but the testator, Thornton, snatched it out of the hands of the person who had picked it out before the fire had caught it, tore it into pieces and threw them into the fire which destroyed it. The solicitor thereupon noted on the draft the fact that the will of which that was a draft had been destroyed by the testator when of unsound mind, in the presence of a witness. Probate being applied for this draft, it was ordered to be granted, the Court being satisfied of the above facts. [*Thornton v. Thornton*, 1899, 3 C. W. N. clxix].

Where a will, shown not to have been revoked, cannot be found at the testator's death, or has been lost or destroyed after his death but before probate, evidence is admissible to prove its contents [*Brown v. Brown*, 8 E. & B. 876; *In re Barber*, *supra*; *In re Leigh* (1892) P. 82] (2).

"If a codicil has been similarly lost or destroyed, its contents may be proved in the same manner. And if a codicil has been lost since the testator's death, without a copy having been made, or the draft kept, and its contents or substance cannot be shown, the Court will grant probate of the will, limited until the original codicil, or an authentic copy thereof, shall be brought in" (3).

§ 6. Probate of a portion of a will.—Following the case of *Sugden v. Lord St. Leonards*, (*supra*), it has been held by the Calcutta High Court that, under section 25 (P), probate can be granted of one portion of a will when the other portion is lost or destroyed [*Kedar Nath Mitter v. Sorojini Dassi*, *supra*, per Sir Francis Maclean C. J. and Banerjee J.], or inserted by fraud or without the testator's knowledge [*Girish Chandra Dey v. Rasharaj Dey*, 1 C. L. J. 109]. See *post*, sec. 42 (P) § 4.

Where a torn will is admitted to probate, missing words will not be read into the will by the Court, but when proved, may be contained in a paper attached to the will [*Gill v. Gill* (1909) P. 157; *Re Wright*, (1910) 44 I. L. T. 137].

(1) Bro. P. P. 127; Tr. and Coote 129; Theob. 43, 3rd Edn.; 50, 5th Edn.

(2) Theob. 49, 5th Edn.

(3) Tr. and Coote 129; Coote 124, 125.

§ 7. **Interpretation of section 25 (P).**—This is an enabling section, and there is nothing to prohibit the grant of probate of a portion of a will, or to follow the rulings of the Courts in England on this point, so long as they are not opposed to reason and justice [*Kedar Nath Mitter v. Sorojini Dassi, supra*].

§ 8. **Miscellaneous.**—When the will is lost, probate may be granted of its codicil only, if it can be shown that the testator intended that it should operate independently of the will. [*In bonis Greig*, L. R. 1 P. & D. 72] (1). See sec. 10 (P), *ante*.

In all cases where it is the object to prove revocation, it must clearly appear that the will was in the possession of the testator when its alleged destruction took place (2).

142. **26 (P)**
210 (s).—When the will is in the possession of a person, residing out of the Province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.

Probate of copy
where original exists.

NOTES AND COMMENTARIES.

§ 1. **The section.**—This section is taken almost *verbatim* from Coote's Common Form Practice, p. 125 (3).

§ 2. **Procedure.**—Following the English practice, the executor should in cases under this section make an affidavit showing the manner in which the will or codicil was transmitted; that a better or authentic copy does not exist in the Province [see sec. 59 (P), *post*, and definition]; and that it is essential or necessary for the interests of the estate that probate be forthwith granted without waiting for the arrival of the original, or a better or more authentic copy. If the copy has been transmitted to a person other than the executor, that person must also join the executor in the affidavit (4).

§ 3. **Bengal practice.**—In the Original side of the Calcutta High Court, necessary petition and affidavits verifying its contents are sufficient in uncontested cases. But in the Mofussil, the practice is to require oral proof in all such cases. (*In re Nobo Doorga*, 7 C. L. R. 387).

(1) Bro. P. P. 126; Flood. 734; Tr. and Coote 130; Hend. 120.

(2) Flood. 732.

(3) See Tr. and Coote 130.

(4) See Coote 125; Tr. and Coote 130; Stokes 146.

143. 27 (P)
211 (S)

Administration until the will be produced.

—Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it be produced.

NOTES AND COMMENTARIES.

Illustration.—This section may be illustrated by the case of *In the goods of Metcalfe* (1 Add, 343). In that case, the deceased, a few days before his death, stated that he made his will whilst in India, and that the same was then remaining there. Administration was applied for “limited for the purpose of receiving and investing the interest and dividends due or to become due on certain stock of the deceased, and for receiving and investing the amount of an India Bill, and for otherwise protecting the property of the deceased,” until the last will of the said deceased, or an authentic copy thereof, should be transmitted to England. In granting the administration prayed for, Sir John Nicholl said: “The deceased cannot be sworn to have died intestate, having, according to his own declaration, left a will in India. An administration *pendente lite* is out of the question, as no suit in this Court relative to the deceased’s affairs is pending. Nor can there be an administration as during the absence out of the kingdom or the minority of an executor, or the like, for *non constat* who the executor is, or even whether there be an executor. At the same time an interval of considerable time must elapse before the deceased’s will can be forwarded from India, in which interval it may be very material that some person should be authorized as well to receive and invest the interest due and accruing upon the deceased’s stock, &c., as to act generally for the protection and management of his property in other particulars. Under these circumstances, considering the reasonableness of the application, and that all parties apparently interested are consenting, I think I am bound to comply with this prayer.”(1)

So where a will proved to have been in existence after the testator’s death, is accidentally lost, and its contents are unknown, the Court will grant administration limited until the original will be found [*Re Campbell*, 2 Hagg. 255; *Re Wright*, (1893) P. 21].

(b)—*Grants for the Use and benefit of others having Right.*

144. 28 (P)
212 (S)

Administration with will annexed to agent of absent executor.

—When any executor is absent from the Province in which application is made, and there is no executor within the Province willing to act, letters of administration with the will annexed may be granted to

the agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

Introductory note.—The foregoing sections refer to grantees who are themselves interested in the estate, or who take in their own right. But the Court will not stop here. It will go further, for the protection of the estate of the deceased. Accordingly, where one or more persons having a right to administration, or a beneficial interest in that estate are precluded from personally acting, by residence out of the jurisdiction of the Court, by their own minority, or by their lunacy or imbecility, the Court will make a grant to another person for the use and benefit of those persons, limiting such grant in duration to such a period as the circumstances of the case demand (1).

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 6. <i>Several executors.</i> |
| § 2. <i>Agent.</i> | § 7. <i>Joint grant.</i> |
| § 3. <i>Effect of grants under this section.</i> | § 8. <i>Power of Attorney.</i> |
| § 4. <i>Termination of grant.</i> | § 9. <i>Special administration.</i> |
| § 5. <i>Absent from the Province.</i> | |

§ 1. **The section.**—This is section 212 of the Indian Succession Act (Act X, 1865), with the word ‘agent’ substituted for the word ‘attorney’ in that section (a).

§ 2. **Agent.**—An ‘agent’ may be defined to be a person employed to do any act for another, or to represent another in dealings with third persons (2). (See Act IX of 1872, section 182; *Kasteer Chand Rai Bahadur v. Dhanpat Singh Bahadur*, I. L. R. 23 C., 26, at 35; Story on “Agency”).

§ 3. **Effect of grant under this section.**—The will proved by the attorney (or agent) of the executor is the same thing as if actually proved by himself. The letter or power of attorney is revocable; and when the executor revokes it and desires probate, the Court is bound to grant it to him (3).

§ 4. **Termination of grant.**—It is not necessary to expressly revoke such grant, as it determines by the executors returning to the jurisdiction and taking probate. The administration is at an end the moment the executor returns [*In bonis Cassidy*, 4 Hagg. 360] (4); and on the death of the executor the letters of administration cease to have any force [*Webb v. Kirby*, 7 De. G. M. & G. 376 (5)]. The grant is made on the same terms as to the party himself, and follows the terms of the power; and no alteration is made in the usual

(a) **Agent and Attorney.**—See sec. 212, Indian Succession Act.

- (1) Tr. and Coote 131.
- (2) Story's Agency § 3.
- (3) Wms. 475.
- (4) Coote 128; Wms. 476, 576; Bro. P. P. 191; Tr. and Coote 132; Hend. 336.
- (5) Wms. 476; Tr. and Coote 132; Walker and Elg. 65.

conditions of the administration bond [*In bonis Goldsborough*, 1 Sw. and Tr. 295 (1). See sec. 36(P), *infra*.]

§ 5. Absent from the Province.—According to the practice in England, it is not necessary that the attorney should reside within the Province, provided his sureties reside therein. (*In re Leeson*, 1 Sw. & Tr. 463) (2). But if the principal and attorney both reside abroad in the same place, the Court will refuse to make a grant to the attorney (3). Where a person entitled to administration is resident within the jurisdiction, and is able to take it himself, the Court will not grant administration to his attorney (*In re Burch*, 2 Sw. & Tr. 139) (4). But under special circumstances, as for instance where the party entitled being of advanced years is unwilling to take upon himself the burden of administration, this rule is departed from, and administration granted to his attorney, although he is within the jurisdiction (*In re Roberts*, 1 Sw. Tr. 64) (5).

Under this section, it is only when the person entitled to probate or letters is absent, that a grant can be made to his attorney or agent (6). It cannot be made when the agent is away. Accordingly, the above mentioned case of *In re Leeson* has not been followed in this country. In *In re Nesbitt* and *In re Briant* (4 B. L. R. App. 49) applications were made for letters of administration by the attorneys of absent executors—both principal and agent being out of the jurisdiction of the Court. Mr. Justice Macpherson of the Calcutta High Court, refused to grant administration, observing, that under sections 212 and 213 of the Indian Succession Act [*i.e.*, sections 28 (P) and 29 (P) of this Act], the Legislature intended that the attorney should be within the jurisdiction of the Court, and that a special procedure having been provided for this country, the English cases did not apply.

If the absent executor has obtained probate abroad, his attorney cannot apply under this section. That is to say, this section does not apply where the will has been proved beyond the limits of the Province [*In re Ashton*, A. W. N. (1905) 251].

§ 6. Several executors.—“If the attorney be appointed by one only of two or more executors, a grant will be made to such attorney for the use and benefit of the executor who appointed the attorney, until he or one or more of the others shall apply.” [*In re Black*, 13 P. & D. 5] (7).

One C. S. Leckie, a British subject, died in England possessed of property both in England and India, leaving a will, by which he appointed four persons to be his executors in England, and W. D. his executor in India, “the latter accounting to the former for his intromissions, upon which he will charge a commission of 3 per cent.” Probate was granted to the four English executors,

(1) Tr. and Coote 132; Wms. 445, 554; Hend. 339; Bro. P. P. 175; Walker and Elg. 93.

(2) Tr. and Coote 133; Bro. P. 175; Hend. 335; Wms. 445.

(3) Coote 128; Tr. and Coote 133; Bro. P. P. 175.

(4) Walker and Elg. 36; Bro. P. P. 176; Wms. 444; Hend. 336; Stokes. 147.

(5) Hend. 336; Stokes 146.

(6) Hend. 336.

(7) Tr. and Coote 132; Coote 128.

but W. D. renounced probate. Thereupon one D. G. L., the constituted attorney of the four English executors, applied for letters of administration with the will annexed. Mr. Justice Phear held that the English executors were intended by the testator to have the power of administering his assets in India as well as in England, that they were not merely executors for England, and that W. D., though named as executor in India, was intended to be only the agent of the executors in England, and accordingly granted the administration applied for [*In re Leckie*, 1875, 15 B. L. R. App. 8].

§ 7. Joint grant.—A joint grant may be allowed to two attorneys of two executors (each executor appointing his own attorney) for the use and benefit of the executors during their joint lives, so as to cease on the death of either of the constituents or the attorneys, or upon either executor applying for probate (1).

§ 8. Power of Attorney.—A general power authorizing the agent or attorney (amongst other things) to appear for the principal in a Court of Justice has been held to be sufficient (2). [But see *In re William Rennie* (1912) I. L. R. 40 C., 74]. A grantee for the *use and benefit* of another may be sued by the party beneficially interested in the same manner as if he had obtained the grant in his own right (*Chambers v. Bricknell*, 2 Hare 536) (3).

According to the rules of the Calcutta High Court, when an application is made by the attorney of an executor or administrator resident in England, Scotland or Ireland, or at any other place beyond the jurisdiction of the Court, the original will or an exemplification thereof, or an exemplification of the letters of administration, must be annexed to the petition, and the power-of-attorney must be verified to the satisfaction of the Court (4).

If the power of attorney contain a power of substitution, and the attorney exercise it, the substitute may take the grant (5). See **Grant to attorney's substitute.** sec. 39 (P), *post*.

In an application for letters of administration by the agent of an absent executor, it is not necessary to prove by affidavit or otherwise, the identity of the person executing the power with the person named in the will as executor. For, in the case of a document purporting to be a power of attorney and to have been executed before and authenticated by a Notary Public*, the authentication of the Notary is to be treated as the equivalent of an affidavit of identity of the executant [*In re Mylne*, I. L. R. 33 C., 625].

In any particular case, however, if the Court is not satisfied, it may, under the above rule, require further evidence of the verification of the Power of

* **Notary Public.**—A law officer whose duty it is to attest deeds, to make authentic copies of documents, to make protest of bills and to act as a legal witness of any formal act of public concern (6).

(1) Tr. and Coote 132.

(2) Walker & Elg. 35.

(3) Wms. 445; Hend. 336; Tr. and Coote 132; Walker & Elg. 36.

(4) Belch. R. 748, P. 311, new Edn. or 273, old.

(5) Tr. and Coote 133; Coote 129.

(6) Brewers Dictionary.

Attorney. That rule is not intended to lay down that in every case the Power of Attorney is to be verified and the identity proved [*Re Mylne, supra*. See sec. 85, Indian Evidence Act, I of 1872].

§ 9. Special administration.—Administration may be specially granted in certain cases similar to those where grants *durante absentia* are made. Thus where an executor was too ill to be served with a citation to accept or refuse probate, the Court granted administration with the will annexed to a residuary legatee for life, for the use and benefit of the executor till his recovery [*Re Ponsonby*, (1895) P. 287].

145. $\frac{29}{213} \frac{(P)}{(s)}$.—When any person to whom, if present, letters of administration with the will annexed might be granted, is absent from the Province, letters of administration with the will annexed may be granted to his agent, limited as above mentioned.

Administration with the will annexed to agent of an absent person, who, if present, would be entitled to administer.

NOTES AND COMMENTARIES.

The section.—This is section 213 of the Indian Succession Act, with the word 'agent' substituted for the word 'attorney' in that section.

Section 28 (P) *supra*, treats of cases where the executors, or persons entitled to probate, are absent; this section treats of cases where the person entitled to letters of administration with the will annexed, are absent.

As regards High Court practice see sec. 28 (P), *supra*, § 8.

146. $\frac{30}{214} \frac{(P)}{(s)}$.—When a person entitled to administration in case of intestacy is absent from the Province, and no person equally entitled is willing to act, letters of administration may be granted to the agent of the absent person, limited as before mentioned.

Administration to attorney of absent person entitled to administer in case of intestacy.

NOTES AND COMMENTARIES.

The section.—Here also, the word 'agent' has been substituted for the word 'attorney' which occurs in section 214 of the Indian Succession Act, of which this is a reproduction.

In England, the attorney of one of several residuary legatees may take out administration with the will annexed, without notice to the other residuary legatees, and the attorney of one of several next-of-kin may, in like manner, take out administration without notice to the other next-of-kin (1).

An attorney who takes administration in the name of another, is compellable to exhibit inventory and account [*Bailey v. Bristowe* (1855) 2 Rob. 145].

147. 31 (P)
215 (S).—When a minor is sole executor or sole

Administration during minority of sole executor of residuary legatee.

residuary legatee, letters of administration with the will annexed may be granted to the legal guardian of such minor, or to such other person as the Court shall think fit, until the minor has attained his majority, at which period, and not before, probate of the will shall be granted to him.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 7. <i>Determination of administration.</i> |
| § 2. <i>Legal guardian.</i> | § 8. <i>Status and Power of administrator, durante minore ætate.</i> |
| § 2a. <i>Guardian and Manager.</i> | § 9. <i>Priority amongst guardians.</i> |
| § 3. <i>"Such other person as...fit."</i> | § 10. <i>Miscellaneous.</i> |
| § 4. <i>Majority.</i> | |
| § 5. <i>"Probate of the will...him."</i> | |
| § 6. <i>Reason of the rule.</i> | |

§ 1. **The section.**—This section corresponds to section 215 of the Indian Succession Act, excepting the words "have completed the age of 18 years," for which the words "has attained his majority" have been substituted.

§ 2. **Legal guardian.**—'Guardian' means a person having the care of the person of a minor or of his property, or of both his person and property (2). Obviously, therefore, a "legal guardian" is one appointed under the authority of the law. A guardian appointed under Act XL of 1858 or Act VIII of 1890 (Guardians and Wards Act) seems therefore to be a legal guardian. [See *In re Nerojini Debi*, I. L. R. 34 C., 706; 11 C. W. N. 697. See also sec. 33 (P), *infra*]. The words may mean a testamentary guardian also, after such guardian has been declared to be so by a competent Court. In section 361 of the Indian Penal Code (Act XLV of 1860) the words "lawful guardian" are explained to "include any person lawfully entrusted with the care and custody of * * minor or other person." But these words, as thus explained, are used in that section in a much restricted sense, as they refer only to "the care or custody" of the person of a minor, and not to that of his property. The words "legal guardian," evidently have reference to the care and custody of both person and

(1) Coote 129; Tr. and Coote 133.

(2) Sec. 4, Act VIII of 1890 (Guardians and Wards Act).

property. Mr. Justice Trevelyan defines the word 'guardian' to mean "the persons to whom the law entrusts the care of the persons and the custody of the estates of infants (1). By virtue of Act VIII of 1890, a guardian is placed, in reference to his dealings with the property of his ward, "on very much the same footing as an executor or administrator with regard to the property of a deceased person" (2).

The Court of Wards is not a *legal guardian* [see *Ganjesser Koer v. The Collector of Patna*, 1898, I. L. R. 25 C., 795; S. C. 2 C. W. N. 349]. But where the testator wished the minor's estate to be entrusted to the Court of Wards, a nominee of such Court may be appointed an administrator [*In re Troylucka Nath Biswas : Nritya Gopal Biswas v. Administrator Gen. of Bengal*, 10 C. W. N. 241].

§ 2a. Guardian and Manager.—The position and powers of a guardian of a minor and those of a manager (not being a guardian) of his property, are not the same [*Mir Sarwarjan v. Fakhruddin Mahomed Choudhuri* (1911) 16 C. W. N. 74, P. C.].

§ 3. "Such other person...ft."—These words imply that the Court is empowered to exercise a wide discretion in the matter of appointing a *guardian* as an administrator for the benefit of a minor. Instances are not rare where the Court has granted administration to persons other than a guardian, as for instance, where the guardian was very old or very poor [see *In re Ewing*, 1 Hagg. 381; *Havers v. Havers*, Barnard Ch. Ca. 23].

In England there is a distinction between *infancy* and *minority*. Infancy continues up to the age of seven; minority commences on the completion of the latter age, and continues until the age of twenty-one. In the case of an *infant* a guardian is assigned by the Court, but a minor may elect his own guardian (3).

§ 4. Majority.—See Act IX of 1875 (Indian Majority Act) and definition of Minority, *ante* pp. 14 to 16.

§ 5. "Probate of the will.....him."—"Where the minor is a sole residuary legatee, no probate can be granted to him upon his arrival at majority, unless he is an executor also. It is only where he is sole executor that probate may be granted to him. See section 6 (P), *ante*.

§ 6. Reason of the rule.—If the right of administration devolves upon a minor, the Court is to grant administration to his guardian, because a minor cannot before his full age give bond to administer faithfully. So in case of the minor being a sole executor, similar administration is granted, because during the minority of the executor there is no person capable of suing or recovering the debts of the deceased. In the former case, the administration is called *durante minore etate*; in the latter, it is a species of administration *cum testamento annexo*, i. e., administration with the will annexed (4). But if A nominate B, a minor, as his executor, and appoint C to act for him until he attains majority, then C would be an executor *durante minore etate* (5).

(1) Law of minority (Tagore L. Lectures, 1877), P. 36.

(2) Speech of the Hon'ble Mr. Scoble in presenting the Report of the Select Committee on the Bill to consolidate and amend the law relating to Guardian and Ward.

(3) See Tr. and Coote 136; Wms. 488.

(4) Wms. 486; Bro. P. P. 167; Coote 129; Walker and Elg. 66.

(5) Flood 725.

§ 7. Determination of administration.—If administration is granted during the minority of several infants, it determines upon any one of them arriving at age. Accordingly, if there are several minor executors, he who first attains majority shall be entitled to prove the will and obtain probate. So the death of any one of such minors before majority will not determine the administration; but the administration will cease on any one of the survivors attaining majority (1).

§ 8. Status and power of an administrator, *durante minore ætate*.—An administrator during minority is but a trustee for the minor, who, on arriving at majority can sue him for an account (2). But such an administrator though possessing a limited and special property in the estate of the deceased, "has for the time all the authority and powers of an absolute administrator; so that, he may do "all acts which are incumbent on an executor, and which are for the advantage of the infant and the estate of the deceased." He can do nothing, however, to the prejudice of the minor. He has no interest or benefit in the testator's or intestate's property, "but in right of the infant." He represents the deceased, but not the minor, so long as his administration subsists; so that, when the administration determines the administrator *durante minore ætate* may be called to account by the executor or by a subsequent administrator. [*Fotherby v. Pate*, 3 Atk. 603; *See Taylor v. Newton* (1752) 1 Lee, 15; Also *Barada Prasad Banerjee v. Gajindra Nath Banerjee* (1909) 13 C. W. N. 557; 9 C. L. J. 383].

Thus, if an administration *durante minore ætate* be repealed, and another such administrator appointed, and the second administrator brings the first to account, and afterwards releases him, yet the infant at full age may compel the first to account again to him and the first account to the second, and his release shall not be any bar to it (3). See *post*, sec. 98 (P).

As regards the general powers of such administrators, whatever doubts might have been formerly entertained, it is now beyond dispute that, generally speaking, there is no distinction between an ordinary administrator and an administrator *durante minore ætate*, and "that the limit to the administration of an administrator *durante minore ætate*, is the minority of the person, but that there is no other limit." [See *Cope v. Cope*, 16 C. D., 49; *Moncell v. Armstrong* L. R. 14 Eq. 425]. See sec. 95 (P), *post*.

§ 9. Priority amongst guardians—In England preference is given to a testamentary guardian (*In bonis Morris*, 2 Sw. and Tr. 360) in the absence of the father of the minor; and when there are several such guardians, the Court will not grant to one without the consent of the other or others (4).

§ 10. Miscellaneous.—A grant to the attorney of the guardian of minors may be made, until the guardian shall personally apply, or one of the minors shall attain majority (5).

Where one executor abroad and others minors.

When one executor is abroad, and the others minors, administration may be granted to the guardian of the minor executors, until the absent executor shall apply, or one of the minors arrive at majority (6).

(1) Wms. 492, 493; Tr. & Coote 139; Coote 133; Walker & Elg. 67.

(2) Walker & Elg. 67 (cited *Goodyer v. Clark* 3 Leon. 103).

(3) Wms. 396-397, 10th Ed.

(4) Coote 130; Tr. and Coote 135-36.

(5) Tr. and Coote 134.

(6) *Ibid*.

If a minor be nearly of full age, it seems "the Court would hold itself to be concluded by his election," and appoint or not an administrator accordingly (1) in the same manner as the Court will not grant a Certificate under Act VIII, 1890 (formerly Act XL, 1858) when the minor is on the point of attaining majority [*Muhamdee v. Nazirun*, 1880, I. L. R. 6 C., 19].

Testamentary guardian's duty "A testamentary guardian of a minor residuary legatee, who is also executor under the will, must, if he decline to take a grant, renounce not only probate, but also, as guardian, his right to administration (with will) for the use of the minors" (2).

The grant may be made to any number of guardians not exceeding three (3).

148. 32 (P).
216 (s)

Administration until one of several minor executors or residuary legatees attains majority.

—When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them has attained his majority.

NOTES AND COMMENTARIES.

The section.—The words "has attained his majority" have been substituted for the words "have completed the age of 18 years," in section 216 of the Indian Succession Act, which is re-enacted here.

If there are several executors and one of them is of full age, no administration *durante minore etate* need be granted: because he who is of full age may execute the will. (4). See sec. 31 (P), § 7, *supra*.

149. 33 (P).
217 (s)

Administration for use and benefit of lunatic and minor.

—If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estates applicable in the case of the deceased, be a minor or lunatic, letters of administration with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has

(1) Tr. & Coote. 139.
(2) *Ibid.* 137-38.
(3) *Ibid.* 140.
(4) Wms. 486.

been committed by competent authority, or, if there be no such person, to such other person as the Court thinks fit to appoint, for the use and benefit of the minor or lunatic, until he attains majority or becomes of sound mind, as the case may be.

NOTES AND COMMENTARIES.

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| <p>1. <i>The section.</i>
 2. <i>Lunatic.</i>
 3. <i>General practice.</i></p> | <p>§ 4. <i>Nature and extent of lunacy.</i>
 § 5. <i>Miscellaneous.</i></p> |
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§ 1. **The section.**—This is section 217 of the Indian Succession Act, with an alteration including minors as well as lunatics.

§ 2. **Lunatic.**—The word ‘lunatic’ is defined in Acts XXXIV and XXXV of 1858, to mean any person *found by due course of law* to be of unsound mind and incapable of managing his affairs (1). “But the Indian Legislature,” says Sir Whitley Stokes, “did not intend to vary from the home-practice (of the Ecclesiastical Courts) of granting administration for the use and benefit of the lunatic, though the person alleged to be so has not been found a lunatic by inquisition” (2). So this section contemplates cases of lunatics who have not been adjudged to be of unsound mind, as well as those who have been so adjudged.

§ 3. **General Practice.**—In general, the practice seems to be that before one is allowed to apply for grant of letters for the use and benefit of a minor, he must get himself duly appointed a guardian for the purpose of applying for such grant; and the application for such grant is to be made in the name of the guardian when so appointed, and not in the name of the minor [*In re Nerojini Debi*, I. L. R. 31 C., 706; 11 C. W. N. 697]. So the grant is never to be made to the minor or lunatic represented by his guardian, but it is to be made to his guardian only for the benefit and use of such minor or lunatic [see *Jailal Singh v. Hari Singh* (1908) 5 A. L. J. 736; A. W. N. 1908, 257]. Where, therefore, no such guardian has been or is appointed, the grant under the section “to such other persons etc.” does not amount to an appointment of a guardian by a competent Court and cannot have the effect of extending the period of minority to 21 years [*Lakshma Ammal v. Tyagarajee* (1911) 24 M. L. J. 450]. See *ante*, p. 16, para. 12.

The English practice is, to prefer the committee of the lunatic if one has been appointed [*Alford v. Alford*, 1 Dea. Rep. 322; 3 Jur. N. S. 990]. “Where the lunatic has not been found so by inquisition the Court exercises its discretion, sometimes granting administration to a residuary legatee, or to the next-of-kin, or to a stranger according to the circumstances of each case, as a rule requiring the next-of-kin to be cited, in the absence of consent, though this may be dispensed with for special reasons.” [*In bonis Crump*, 3 Phill. 497] (3).

(1) See sec. 8 (P), § 3 *ante*.

(2) Stokes, 148.

(3) Bro. P. P. 193; Wms. 525.

In cases under this section, recourse may be had to be provisions of section 34 (P) *infra*, for the preservation and protection of the deceased's property especially when such property is in jeopardy being perishable or otherwise, instead of 492 of the Code of Civil Procedure of 1882 (corresponding to Or. XXXIX r. 1 of the Code of 1908), which seems to be intended for purposes other than what section 34 (P) contemplates [*Madhavrao Yeshwant v. Maniklal Pranshankar*, 2 Bom. L. R. 797].

The grant of administration under this section is in the discretion of the Court, no party being of right entitled to it. [*In bonis Southmead*, 3 Curt. 28] (1).

§ 4. Nature and extent of lunacy.—In order that an executor may be excluded from performing the duties devolving upon him, it must be shown that he is wholly incapacitated by insanity. Mere mental weakness is not sufficient. [*Evans v. Tyler*, 2 Rob. 131, 132,] (2). See *ante*, sec. 6 (P), § 5.

§ 5. Miscellaneous.—Where one of two or more joint administrators become a lunatic, letters of administration *de bonis non* [see sec. 45 (P), *post*] should issue *de novo* to the same administrators only. [*In bonis Phillips*, 2 Add. 335] (3).

So, where one of two executors becomes a lunatic, the probate is to be revoked, and a fresh one granted to the same executor alone, power being reserved for making a like grant to the other when he should cease to be of unsound mind. [*In bonis Marshall*, 1 Curt. 297] (4). In *In re George Shaw* [(1905) P. 92] one of three executors who had proved the will became of unsound mind, and fresh grant of probate was made reserving such power and on the original probate being revoked.

“A grant may be doubly limited *durante dementia* and *durante minore ætate*.” Thus where an intestate left a widow and an infant, and the widow took out administration, but became insane, administration was granted to the aunt of the infant, for the use and benefit of the widow and the infant, during the incapacity of the one and the minority of the other. [*In bonis Binfield*, 1 Lee. 625; *Fawkener v. Jordan*, 2 Cas. temp. Lee. 327] (5).

Of two executors, if one is lunatic and the other abroad, administration may be granted to the attorney of the latter until he personally applies for probate, or the lunatic recovers his reason and obtains a similar grant (6).

If, during his inability the lunatic dies, the grant ceases, and must be given to some other person entitled to receive it. If the administrator *durante dementia* dies before the lunatic, a new grant is to be made with all the formalities of the law.

(1) Tr. and Coote 177; Wms. 524, 525; Walker and Elg. 64; Bro. P. P. 193.

(2) Flood. 728; Walker and Elg. 9.

(3) Wms. 526; Bro. P. P. 193; Tr. and Coote 200, 292; Walker and Elg. 80.

(4) Walker and Elg. 80; Wms. 527; Tr. and Coote 200, 292; Hend. 348.

(5) Bro. P. P. 193; Wms. 527; Tr. and Coote. 293; Walker and Elg. 69, 80.

(6) Tr. and Coote 142.

- 150. 34 (P)**
218 (S).—Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator other than the right of distributing such estate; and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

**Administration
pendente lite.**

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 6. <i>Termination of the administration under the grant.</i> |
| § 2. <i>On what ground the grant may be made.</i> | § 7. <i>The status and powers of the grantee.</i> |
| § 3. <i>Persons eligible to the grant.</i> | § 8. <i>Miscellaneous.</i> |
| § 4. <i>At whose instance the grant may be made.</i> | § 9. <i>Administration pending appeal.</i> |
| § 5. <i>Dispute justifying such grant.</i> | § 10. <i>Accounting under this section.</i> |

§ 1. **The section.**—This is with slight verbal alterations, section 70 of the Court of probate Act, 1857 (20 and 21 Vict. C. 77). That section enacts,—“that, pending any suit touching the validity of the will of any deceased person, or for obtaining, re-calling, or revoking any probate or any grant of administration, the Court of probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction.”

§ 2. **On what ground the grant may be made.**—Before any such grant is made, it must be shown to the satisfaction of the Court “that there is something required to be done and there is no person empowered to do it.” In other words, such grants are made only on grounds of absolute or pressing necessity [*Bellow v. Bellow*, 34 L. J. P. & M. 125; 4 Sw. & Tr. 58], and the Court must be satisfied of such necessity, and will appoint an administrator *pendente lite* if it is only just and proper to do so [*Jogendra Lal Chowdhury v. Atindra Lal Chowdhury* (1909), 13 C. L. J. 34; *Bhubanmohini Debi v. Kiranbala Debi* (1910) *Ibid*, 47; *Young v. Brown* (1828), (1) Hagg. 54] (2). In *Bellow v. Bellow* (*supra*), it was further decided that an administrator *pendente lite* might be appointed “in all cases in which it was the practice of the Court of Chancery to appoint a receiver,” even if a receiver had already been appointed

(1) Flood. 728.

(2) Wms. 400, 10th Edn.; Ingpen. 12.

[*Tichborne v. Tichborne*, 17 W. R. (Eng.) 832; *Re Cleaver*, (1905) P. 319]. The necessity may be established by showing that the estate is perishable or in jeopardy [*Sutton v. Smith*, 1 Lee. 209]; or that it is necessary "for the preservation or protection of the deceased's property [see *Madhavrao Yeshwant v. Maneklal Premankar*, 2 Bom. L. R. 797]; for the receipt and investment of rents, &c.; for the payment of debts and interest on mortgages, &c." (1). Thus the section is also applicable in cases which come within the operation of section 492 of the Code of Civil Procedure of 1882 corresponding to Or. xxxix. r. 1 of the Code of 1908.

The special ground for such grant is that there is no one legally entitled to receive or to hold the assets, or to give discharges [*Brindaban Chandra Shaha v. Sureswar Shaha Paramanick* (1909) 10 C. L. J. 263; *Bhuban Mohini Debi v. Kiranbala Debi* (1910) 13 C. L. J. 47]; and for this reason the Court will not appoint an administrator under this section where there is an executor named in the will whose appointment is not questioned and who can discharge the duties of such an administrator [*Mertimer v. Paull* (1870) L. R. 2 P. & D. 85; *Jogendra Lal Chowdhury v. Atindra Lal Chowdhury*, 13 C. L. J. 34].

In England the practice of the Court of probate is, in this respect, assimilated to the practice of the Court of Chancery in appointing a receiver (2) (a).

The Court must also be satisfied as to the fitness of the proposed administrator [*Bellew v. Bellew*, *supra*].

§ 3. Persons eligible to the grant.—The grant is to be made to one who is indifferent between the contending parties [*Young v. Brown*, 1 Hagg. 54]; or to one of such parties with the consent of the other [*Colvin v. Fraser*, 2 Hagg. 613] (3); or to a nominee of both the parties when they agree in their nomination [*Northey v. Cock*, 1 Add. 329]; or jointly to a nominee of each [*Hellier v. Hellier*, 1 Lee. 281]. A nominee should be one "who is indifferent between the parties, who is a house-keeper and a man of substance." [*Bond v. Bond*, 1 Lee. 357].

If the parties cannot agree, the Court will appoint either one of their nominees, or a nominee of its own; and will prefer the nominee of a party whose interest is certain, to that of one whose interest is uncertain [*Bond v. Bond*, 1 Lee. 333; *Taylor v. Taylor*, *ibid*, 527].

Where neither of the parties applies, a creditor's nominee or even a creditor may be appointed [*Tichborne v. Tichborne*, L. R. 1 P. & D. 731].

§ 4. At whose instance the grant may be made.—The appointment may be made on the application of a person not a party to the suit. Thus where a suit was likely to be protracted, the Court on the application of a creditor (who was not a party) appointed an administrator *pendente lite*, in order to enable him to obtain payment of his debts [*Tichborne v. Tichborne*, *supra*].

(a) Receiver may be appointed under Or. LX. rr. 1 to 3 of the Code of Civil Procedure (Act V of 1908), "for the realization, preservation, or better custody, or management of any property, * * the subject of a suit, or under attachment" (See *Sidheswari Dabi v. Abhoyeswari Dabi*, I. L. R. 15 C. 818; *Siv Ram Das v. Mohabir Das*, I. L. R. 27 C., 179).

(1) Tr. and Coote 481.

(2) Tr. and Coote 481; Wms 504.

(3) Wms. 401, 10 Ed.

§ 5. Dispute justifying such grant.—The appointment may be made either before or after the grant of probate in common form (1). It is, however, necessary that the dispute must have reference to the appointment of executors, because an appointment of administrator *pendente lite* is made only in order that he may discharge certain duties which there is no body else to discharge. [*Mortimer v. Paul*, L. R. 2 P. & D. 85, 86]. Thus where the suit was to try the validity of a second codicil which did not affect the appointment of executors, the will which appointed executors and the other codicil being admitted, the Court refused to appoint an administrator *pendente lite*, on the ground that there was an undisputed executor who was the proper person to administer (*Ibid*).

Administration *pendente lite* is rarely granted when the executor opposes except on absolute necessity, for protection of the estate (2).

§ 6. Termination of the administration under the grant.—The functions of an administrator under this section commence from the order of appointment and terminate on the pronouncement of the final decree [*Wieland v. Bird* (1894) P. 262; *Radhika Mohan Roy v. Bonnerjee*, 10 C. W. N. 566]; so that, if there be an appeal, they do not cease until it has been disposed of [*Taylor v. Taylor*, 6 P. D. 29] (3).

If on the termination of the appointment of an administrator under this section, he continues to hold and deal with the property in the same way as he did before his functions as such administrator came to an end, he can be sued as *quasi* executor *de sou tort* on the general principles of Hindu and English law [*Kshitish Ch. Acharya Chowdhuri v. Radhika Mohan Roy*, 12 C. W. N. 237; I. L. R. 35 C. 276; See *Magaluri Garndia v. Narayana Rungiah*, I. L. R. 3 M., 359, 363].

§ 7. The status and powers of the grantee.—“An administrator *pendente lite* is merely an officer of the Court; his administration is to be under the direction of the Court to represent the deceased.” [*In bonis Graves*, 1 Hagg. 313] (4). A receiver is also a servant of the Court, and has only such power and authority as the Court may choose to give him [*Manick Lall Seal v. Surrat Coomaree Dassee*, 1895, I. L. R. 22 C., 648]. See § 8, *infra*.

An administrator *pendente lite* being the appointee of the Court, is not to be considered as the nominee or agent of the party or parties on whose recommendation he is selected [*Stanley v. Bernes*, 1 Hagg. 221] (5). And as by virtue of this section he has “all the rights and powers of a general administrator other than the right of distributing such estate” (the estate of the deceased), he is not required to apply for sanction each step taken in the performance of the ordinary duties of an administrator. “In matters, however, of importance, involving difficulty or unusual responsibility, he is justified in taking out a summons for directions” (6). An administrator *pendente lite* may, with the permission of the Court, grant a mokarari lease of debutter property [*Lasman Das Mohunt v. Bejoy Kumar Nag*, 11 C. W. N. cxvii]. And although he is under no obligation to distribute the assets of the estate, he will not be compelled to refund where he has made distribution according to law (*Bradford's Case*, 1 Brown (Pa.) 87] (7).

(1) Tr. and Coote 147; Coote 140.

(2) Tr. and Coote 147; Coote 140.

(3) Tr. and Coote 148, 483; Coote 142.

(4) Tr. and Coote 483.

(6) Tr. and Coote 148.

(5) Wms. 505; Elg. 75; Bro. P. P. 433 (2).

(7) Sec. 18 Cyc. Am. 596.

An administrator appointed under this section is entitled to receive from the estate of the*deceased such reasonable remuneration as the Court shall think fit. In England, such remuneration is payable under sec. 72* of the Court of Probate Act [20 and 21 Vict C. 77] (1).

Except by consent of all parties, the Court has no power to authorize an administrator *pendente lite* to pay an annuity by way of maintenance to a residuary legatee who is also a next-of-kin [*Whittle v. Keats*, 35 L. J., P. & M. 54]. Nor, when such administrator has taken possession of the deceased's property, is the Court empowered to authorise him to restore any property to any party [*Kashi Nath Singh v. Sheo Shankar Pande*, A. W. N. (1905) 127].

§ 8. Miscellaneous.—A suit for administration is maintainable against administrator *pendente lite*, by a creditor [*Westwood v. Booker*, 1 Ch. 866] or next-of-kin, *i.e.*, heir at-law of the deceased [*Meerza Kuratul-Ain Bahadur v. Broughton*, 1. C. W. N. 336]. In the case last cited the administrator *pendente lite* (the defendant) was the executor nominate of the deceased testator. He was appointed to the office on his own application.

The distinction between the position of an administrator *pendente lite* and a receiver, seems to lie in the fact that the former represents the estate for all purposes except for distribution, but the latter represents neither the estate nor the parties.

§ 9. Administration pending appeal.—In *Wright v. Rogers* [(1869) L. R. 2 P. & D. 179] administration *pendente lite* was granted to the executors of the will which had been pronounced for pending an appeal to the House of Lords (2).

§ 10. Accounting under this section.—There is no difference between the liability of an administrator under this section and that of one under section 98 (P), *infra*, so far as accounting is concerned; so that, an administrator is equally liable to render account under both these sections. But then, it may be remembered that, as held in *Sara Sundari Barmani v. Uma Prasad Roy* [I. L. R. 31 C., 628; 8 C. W. N. 578], the Court of Probate has no authority under section 98 (P) to order a judicial inquiry into the accounts submitted by an executor or administrator in consequence of which there being no finality in the matter he remains always liable to be sued for it in a Court of Equity. A similar question was raised in a case under this section, and it was held by Sir L. Jenkins, C. J. that, although an administrator after full administration is entitled to be discharged from his trust, whether under this section or section 98 (P) *infra*, his liability to be sued for account in a Court of Equity, or "what we may

* The Court of Probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court thinks fit. Sec. 72 Court of Probate Act.

(1) Tr. and Coote 483; Bro. P. P. 433; Wms. 505; Walker and Elg. 71.

(2) Wms. 399, n. 10th Ed.

call here, under the general jurisdiction of the Court," continues. Accordingly, the mere fact that the administrator *pendente lite* may have been discharged from further acting as such administrator the passing of his accounts in the testamentary jurisdiction, does not operate as a discharge so as to constitute a bar to a suit for account brought in the general jurisdiction of the Court.* [*Khitish Chandra Acharya Choudhury v. Osmond Beeby* (1912) I. L. R. 39 C. 587; 16 C. W. N. 516]. In the same case [*Khitish Chandra Acharya Choudhury v. Osmond Beeby*, (1911) 15 C. W. N. 832], Mr. Justice Harrington was of opinion that where an administrator under this section has accounted in the presence of parties who are entitled to call on him to account, and when those accounts have, in the presence of those parties, been passed by the Court, there is no principle on which the same administrator could be again made liable to render account, in the absence of fraud, mistake or some omission.

(c). *For special purposes.*

151. **35 (P)**.—If an executor be appointed for any
219(s) limited purpose specified in the will, the

Probate limited to
purpose specified in
the will.

probate shall be limited to that purpose, and, if he should appoint an agent to take administration on his behalf, the letters of administration with the will annexed shall accordingly be limited.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Miscellaneous.*

§ 1. **The section.**—This is section 219 of the Indian Succession Act, with the word 'agent' substituted for 'attorney' which occurs in that section.

Limited probate cannot be granted except where the will itself limits the interest of the executor (1). This is the rule laid down

Limited probate. in *Sutton v. Smith*. [1 Lee 280]. It seems this section embodies that rule. [See *In re Thakur Madhabji Dharamsi*, 1880, I. L. R. 6 B., 460].

§ 2. **Miscellaneous.**—"If a testator appoint an executor of his will generally, and another executor for particular purposes, and the general and limited executors both apply for probate at the same time, the grant is made in the same instrument, but the powers of each are distinguished; that is to say, probate is therein granted of all the estate of the deceased to the general executor, and of that part thereof to the limited executor to which

* His Lordship did not mean to lay down a general proposition of law applicable in all cases of administration under this Act. See *infra*, sec. 78 (P) § and sec. 98 (P), §.

his executorship is expressly confined." And, in case the general executor apply before the limited one, a general probate is granted to the former, power being reserved of granting limited probate to the limited executors (1).

Where an executor is appointed with limitations as to the time when he shall begin his office, *e. g.*, at the expiration of five years from the death of the testator, and no person is appointed by the testator to act before the period limited for the commencement of the office, "the Court must commit administration limited until there be an executor" (2).

So an administration limited to the effects of the deceased in one country or place may be granted to one administrator, and an administration limited to those in another country or place to another [*Re Mann* (1891) P. 293; *Re Tamplin*, (1894) P. 39].

152. 36 (P).
220 (s).—If an executor appointed generally give an authority to an attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration with the will annexed shall be limited accordingly.

Administration with will annexed limited to particular purpose.

NOTES AND COMMENTARIES.

§ 1. **The section.**—This is from Coote's Common Form Practice (3), where it is laid down that "where the power given by an executor to his attorney to prove a will for him is special, and limited to specific property, the grant of administration (with will) made to the attorney is limited accordingly." This is in accordance with the principle—"The grant follows the terms of the power." (*See In re Goldsborough*, 1 Sw. & Tr. 295) (4). See sec. 28 (P), § 3, *supra*.

This section corresponds to section 220 of the Indian Succession Act. But it is not clear why the word 'attorney' has not been replaced by the word 'agent' as in the preceding sections.

153. 37 (P).
221 (s).—When a person dies leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as

Administration limited to trust property.

(1) Tr. and Coote 150; Coote 143.

(2) Wms. 409, 10th Ed.

(3) Coote 148.

(4) Tr. & Coote 132 (c), 156; Wms. 445, 554; Bro. P. P. 175; Hend 339; Walker and Elg. 93 (b).

such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

NOTES AND COMMENTARIES.

- | | |
|-----------------------------|---|
| § 1. <i>The section.</i> | § 4. <i>Application of the section.</i> |
| § 2. <i>"Beneficiary."</i> | § 5. <i>To whom granted.</i> |
| § 3. <i>Trust property.</i> | § 6. <i>Effect of the grant.</i> |
| § 7. <i>Miscellaneous.</i> | |

§ 1. **The section.**—This is section 221 of the Indian Succession Act, with slight verbal alteration. It treats of cases where the representation is limited in estate (a).

§ 2. **"Beneficiary."**—Where property is dedicated to an idol, the idol, being the *cestui que trust* (1), is a beneficiary within the meaning of this section. [*Runjit Singh v. Jagannath Prosad Gupta* (1885), 1 L. R. 12 C., 375]. So in *Purmanundas Jeewandas v. Venayekrao Wassoodeo* [1882, 1 L. R. 7 B., 19; 1 L. R. 9 I. A. 86], *Sadhus* and *Sannyasis* for whose benefit a sum had been dedicated for the establishment and maintenance of a *Dharamsala*, were held to be "beneficiaries."

In *Ranjit Singh's* case (2) reference being made to this section their Lordships (Norris and Ghosh JJ.) said:—"Upon the death of Rani Annapurna, the properties mentioned in the will became the idols and Annundmoyee became the sole trustee for the idols. But she died * * without appointing another trustee and leaving * * * no general representative, who, by virtue of his or her being such representative could take charge of the idol's estate. That being so, the administration, according to the wordings of the above section, devolves upon the idol, the *cestui que trust*; but it being impossible for the idol to take the management, some body else on its behalf may apply for administration" (at p. 379).

An executor is a general representative [*Saroda Sundary Gupta v. Ram Narayan Choudhuri* (unreported), decided, 27th July, 1893, in App. No. 194 of 1892].

§ 3. **Trust property.**—Such property passes under a grant of probate or letters of administration of the deceased's general estate, so that the executor or

(a) This section corresponds to the following passage in *Tristram and Coote's "Probate Practice"*:—"If a person has died leaving personal property of which he was sole or surviving trustee, administration may be granted limited to that property provided that the persons entitled to a general grant to the deceased trustee are first cleared off" (3).

(1) *Cestui que trust*.—This expression is used to designate an *equitable* owner as distinguished from a *legal* owner, *i. e.*, the owner of a *legal* estate. In this country the word 'beneficiary' is intended to express the same meaning as the words *cestui que trust* do in England.—As to the distinction between *legal* and *equitable* estate, see sec. III, *ante*.

(2) The facts of this case are given in sec. 45 (P), § 6. *post*.

(3) *Tr. and Coote. Prob. Pr.* 157, 12th Ed.

administrator is able to receive it and transfer it to the persons entitled under the provisions of the instrument creating the trust either as trustees or beneficiaries (2). But if the deceased trustee had no general estate, or none within the province or district, the Court has no jurisdiction to make a grant in respect to his general estate, but it can in that circumstance, make a grant under this section limited to the property held in trust. And in such case the proper person to apply for grant is the beneficiary or trustee for the beneficiaries entitled under the trust deed, the next-of-kin having no interest in the property and consequently having no right to the grant [*Re Cunliffe* (1903) Mad. per Boddam J.]. See *infra*, sec. 76 (P).

§ 4. Application of the section.—This section, as held by Messrs Justices Prinsep and Stevens, applies “only to property, in which a deceased person had ownership, so as to constitute it a portion of his estate, although he held it in trust” (a). Thus property of a “*Muth*” in which the deceased had no ownership, does not come under the operation of this section [*Mohunt Jib Lal Gir v. Mohunt Jaga Mohan Gir* (1898) 2 C. W. N. cccxi ; S. C. 16 C. W. N. 798 ; see *Runjit Singh v. Jugannath Prosad Gupta* (I. L. R. 12 C., 375) distinguished].

B, a Hindu-lady, executed a will by which she dedicated her property to two idols established by her husband and her father-in-law, and appointed her son, S, as the *shebait*. She then provided that on the death of S his heir-at-law or the person or persons whom he might by his will appoint, should be the *shebait* or *shebait*s in due order. S also left a will by which he appointed his sister, Saroda Sundary, his executrix, and left all his property to his infant son, D, with remainder, if he should die childless and unmarried, to the same two idols, and provided that his said sister should be the trustee or *shebait* of those idols to the extent of his own properties. He also provided that as regards the trust properties left by his mother, B, the same sister should be the *shebait* of the idols until D attained majority. In due course, both S and Saroda Sundary took out probate of the will of their respective testatrix and testator.

B died in 1290 ; S died in 1292 ; and D died in 1297, before he attained majority and unmarried.

In this state of things, R and K, the nearest legal heirs of D (being the great-grand-sons of the great-great-grand-father of D), applied for letters of administration to the estate of B, to administer the idols' property, with her will annexed. This application was opposed by Saroda Sundary, B's daughter. The question was whether R and K were entitled to administer the trust created by B, and whether this section applied to the case. Both these questions were answered in the affirmative by the District Judge. On appeal, this decision was reversed, and it was held by Messrs. Justices W. Macpherson and Bannerjee

(a) What their Lordships mean seems to be, that a trustee under this section must have an estate, or to use their own words, must have “ownership so as to constitute it a portion of his estate, although he held it in trust.” As to the nature of such estate it is evident from the words in the section “and leaves no general representative,” that it is divisible ; so that if a trustee leaves a general representative by appointing an executor [*Sarada Sundari Gupta v. Ram Narayan Chawdhuri*, *supra*], the legal interest (or estate), as distinguished from equitable interest (or estate) will vest in such executor, the equitable interest devolving on the beneficiary or *cestui que trust* [Sec. 4 (P), *supra*]. It is thus clear that this section, or more properly speaking, this Act, recognises the distinction between legal and equitable estate as it obtains in England. This is opposed to the view expressed by the Privy Council in *Tagore v. Tagore*. See *ante* sec. III, pp. 65—66, n. (a) and 67, n. (a). Also see 18 C. W. N. p. cxxvi.

(now Sir Gooroodas Bannerjee) that, this section did not apply to the case, and under no circumstances could R and K be entitled to administer in preference to Saroda Sundary, the grantor B's daughter. Their Lordships observed: "It seems clear that Dharanidhar (D) never did become trustee and that the office, if it became vacant at all became vacant when Sreedhar (S) died. Section 37 of the Act does not, however, apply to the case, because it cannot be said that Sreedhar died 'leaving no general representative or one who is unable or unwilling to act as such.' He left an executrix who proved and took out probate of this will (Sreedhar's will), and an executrix is, we think, within the meaning of that section a general representative. The probate was in no way limited and covered the whole estate of Sreedhar (S). * * * * The case was argued before us as if Dharanidhar (D) was the last trustee and it was said that, as he had died leaving no general representative section 37 applied, and the applicants as his heirs were entitled to administer. We have already pointed out that Dharanidhar never was trustee, and the Judge seems to have been of the same opinion * * *. If Dharanidhar was the last trustee, it may be said that section 37 applied as he left no general representative, but even in that event it is by no means clear that the applicants are entitled to administer in preference to Saroda Sundary the grantor's daughter." [*Saroda Sundary Gupta v. Ram Narayan Choudhuri* (unreported), decided 27th July, 1893, App. No. 194 of 1892].

§ 5. To whom granted.—"If a trust is still subsisting on the death of the surviving trustee, and new trustees have been duly appointed, administration will be granted of the effects of the former to the new trustees or to their nominee. Where new trustees have not been appointed, grants have been made to the nominee of the persons entitled to appoint new trustees: but the proper course would seem to be to take the necessary steps to have new trustees appointed with the view of their subsequently applying for the limited grant."

The Court will grant letters of administration to a *cestui que trust* of a trust fund limited to that trust, when the trustee in whose name the fund stands is dead, and is without a personal representative, the parties entitled to represent the deceased trustee having been first cited; when there are several parties interested in the fund the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestui que trust* assent to the grants extending to their respective interests [*Pegg v. Chamberlain*, 1 Sw. & Tr. 527] (1).

It may be noted that, according to Hindu Law, when the worship of a *Thakur* has been founded, the office of a *shebait* is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise [*Gossami Sri Gridharji v. Romanlalji Gossami*, I. L. R. 17 C., 3; L. R. 16 I. A. 137].

So in a family governed by the Mitakshara a person on his birth becomes entitled jointly as *shebait* of *Debutter* property held by the family, the same rule governing the devolution of hereditary office and family property [*Ramchandra Panda v. Ram Krishna Mohapatra*, I. L. R. 33 C., 507.]

§ 6. Effect of the grant.—By virtue of a grant under this section the grantee does not acquire, nor has he power rightfully to dispose of any interest

outside the limits of that grant. He becomes simply the legal representative of the deceased for the purpose of his interest in the property which being a limited one any grant or conveyance by such a grantee does not touch the beneficial interest [*De Silva v. De Silva* (1902) 5 Bom. L. R. 784, per Sir L. Jenkins. C. J.].

Where a testator's will contains an appointment of general executors and they alone prove such will, his trust and mortgage estates devolve upon such executors as his legal representative, although the will may also contain an appointment of special executors of the trust or mortgage estates [*Re Parker's Trusts* (1894) 1 Ch. 707].

§ 7. **Miscellaneous.**—In making this grant “the Court follows the deed or will, which created the trust, in all points.” It is limited to the right and interest of the deceased in the property in question (1).

If only some of the parties elect, the grant will be made to their nominee to the extent of their shares [*Pegg v. Chamberlain, supra*]; so that the dissentient parties may afterwards apply for a grant limited to the remaining shares. If the party applying be entitled only to a life interest in the fund, the grant will be limited to the receipt of the dividends, or other produce of the fund during the annuitant's life (2).

Persons entitled to general representation, must renounce, or consent, or be cited [*Pegg v. Chamberlain, supra*] (3).

154. ^{222 (S)} **38 (P).**—When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said suit, and until a final decree shall be made therein and carried into complete execution.

Administration
limited to suit.

NOTES AND COMMENTARIES.

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| 1. <i>The section.</i> | § 3. <i>Effect of the grant.</i> |
| 2. <i>Ad litem and pendente lite distinguished.</i> | § 4. <i>Miscellaneous.</i> |

(1) Tr. and Coote 158, 159.
 (2) Tr. and Coote 159; Stokes 150.
 (3) Tr. and Coote *Ibid*.

§ 1. **The section.**—It seems a material portion of this section is borrowed from the wordings of the form of similar grant in the English Courts, which runs as follows :—

“To attend, supply, substantiate, and confirm the proceedings already had, or that shall or may be had in the said suit in the High Court of Chancery or in any other cause or suit, which may be commenced in the said Court, or in any other Court between the said parties or any other parties, touching or concerning the matters of issue in the said suit, and until a final decree shall be made or had therein, and the said decree carried into execution and the execution thereof fully completed” (1).

It (this section) treats of grants limited to a particular object. The grant made under this section is termed grant or administration *ad litem*, i.e., for prosecuting or defending proceedings begun, or to be begun in a Court of Justice.

§ 2. **Ad litem and pendente lite, distinguished.**—A grantee *ad litem* is appointed to represent the deceased person in litigation, and he is a party to the suit; whereas a grantee *pendente lite* is appointed simply to administer the estate of the deceased during litigation (2).

§ 3. **Effect of the grant.**—The grant of administration *ad litem* “makes the grantee complete representative of the estate to the extent of the authority which the letters purport to confer, and a decree against such grantee is therefore binding upon any one who may afterwards take out general administration to the estate.” [*Davis v. Chanter*, 2 Phillips. 545] (3).

A grantee under this section can only carry on the suit to its termination, but he cannot receive its fruits unless specially empowered to do so [*In bonis Dodgson*, 1 Sw. & Tr. 259] (4).

§ 4. **Miscellaneous.**—Administration may be granted to the nominee of a plaintiff who is about to commence proceedings (5). Thus in *Howell v. Metcalfe* (2 Add. 351), the plaintiff having filed a bill against the executors who had been absent in a foreign country, and there being no legal representative of the deceased to be made a party to the suit, the Court granted letters of administration to a nominee of Mr. Howell, the plaintiff, limited to the purpose only of answering to the said suit in the Court of Chancery (6).

A district Judge cannot grant administration under this section if the deceased had not a fixed place of abode within the local jurisdiction of the district. [*Fardunji Aspandiarji v. Navajbai*, I. L. R. 17 B., 689].

155. **39. (P).**
223 (S) —If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has or have been granted is absent from the Province within which the Court that has granted the probate or

Administration limited to purpose of becoming party to a suit to be brought against executor or administrator.

(1) Bro. P. P. 195-96; Coote 152; Tr. and Coote 160.

(2) Flood. 717.

(3) Bro. P. P. 196; Walker and Elg. 83; Wms. 530-31.

(4) Bro. P. P. 196; Coote 153; Tr. and Coote 161.

(5) Tr. and Coote 161; Coote 152.

(6) Wms. 523.

letters of administration is situate, such Court may grant to any person whom it thinks fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

NOTES AND COMMENTARIES.

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|---|-------------------------------------|
| § 1. <i>The section.</i> | § 4. <i>Determination of grant.</i> |
| § 2. <i>Purpose of the grant.</i> | § 5. <i>"Twelve months."</i> |
| § 3. <i>Procedure on death of executor.</i> | |

§ 1. **The section.**—This section is founded on the first and third sections of Sta. 38 Geo. III, c. 87 (an Act for the administration of assets in cases where the executor to whom probate has been granted is out of the Realm). The object is to provide a method for the speedy distribution of the assets of a deceased person where the executor to whom probate has been granted is absent from the province.

§ 2. **Purpose of the grant.**—Under this section the administrator is not appointed for a limited period, but for a limited purpose, viz., "to become and be made a party to a suit and to carry the decree into effect." "The suit so instituted is not, therefore, to fall to the ground, and be at an end, by the return of the executor, but it is to go on, he being made a party in the usual course; and then the temporary administrator may account, have his costs, and be discharged." [*Rainsford v. Taynton*, 7 Ves. 460] (1).

§ 3. **Procedure on death of executor.**—If the executor die abroad after the grant of an administration under this section, such administration does not come to an end, nor the authority of the administrator ceases thereby. "The proper course upon such an event seems to be that in case of his dying intestate, some person should take out general administration to the original testator, or if the former executor made a will appointing an executor capable of acting, such executor should obtain probate, so as to represent the original testator, and then such administrator or executor * * * may apply to be made a party to the suit in equity: and the Court of equity will then put an end to the authority of the special administrator in the same way as if the original executor had returned—" (2). [*Rainsford v. Taynton*, *supra*].

§ 4. **Determination of grant.**—From the above it will appear that the authority of an administrator appointed under this section does not determine on the return or death of the original executor or administrator as it does in the case of grant *durante absentia* [sec. 28 (P), *supra*] to attorneys of absent executors. But such authority is voidable on the death or return of the absent representative. [*Taynton v. Hannay*, 3 Bos. & Pul. 26] (3).

(1) Wms. 516; Tr. and Coote 295; Coote 153.

(2) Wms. 517.

(3) Wms. 516; Bro. P. P. 191; Tr. and Coote 295.

§ 5. "Twelve months."—"At the expiration of Twelve months," means *at or after* the expiration of 12 months (1).

156. 40 (P)
224 (S)

Administration
limited to collection
and preservation of
deceased's property.

—In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose district any of the property is situate may grant, to any person whom such Court thinks fit, letters of administration limited to the collection and preservation of the property of the deceased, and giving discharges for debts due to his estate, subject to the direction of the Court.

NOTES AND COMMENTARIES.

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| 1. <i>Object of the grant.</i> | § 3. <i>Extent of Court's authority.</i> |
| 2. <i>Persons eligible to the grant.</i> | § 4. <i>Miscellaneous.</i> |

§ 1. **Object of the grant.**—Administration granted under this section is ordinarily termed administration *ad colligenda bona defuncti*. In default of representatives and creditors, that is, persons entitled to administer the estate of a deceased, such administration is granted by the Court, in the exercise of its discretion to such competent person as it approves of, "where there is danger to the estate by reason of the same being of a perishable or precarious nature." The object of the grant is to prevent damage to the estate or effects of the deceased; and bare necessity is its foundation (2).

The expression "In the exercise of its discretion" means,—“according to the rules of reason and justice, not private opinion; according to law and not humour; it is to be, not arbitrary, vague and fanciful, but legal and regular [see *Sharp v. Wakefield* (1891) A. C. 173]; to be exercised not capriciously but on judicial grounds and for substantial reasons [In *re Taylor*, 4 Ch. D. 160]. See *infra* sec. 41 (P), § 7.

§ 2. **Persons eligible to the grant.**—It is not necessary that the grantee should have any right or interest in the estate. The administration will be granted "not only to any one whom the Court considers for the occasion eligible, but will also be made to the persons who are entitled to a full grant, but in the interests of the estate cannot wait [In *re Clarkington*, 2 Sw. & Tr. 382; 10 W. R. (Eng.) 124]; or to entire strangers, who brought into connection with the affair" [In *re Wyke*, 3 Sw. & Tr. 22] (3).

(1) Bro. P. P. 191.

(2) Bro. P. P. 197; Flood. 711, 712; Tr. & Coote 164; Walker & Elg. 90.

(3) Tr. & Coote 165; Flood. 712; Coote 166; Walker & Elg. 90.

In *In re Rolland* [4 C. W. N. cxc], grant *ad colligenda* was made to a friend of the deceased who had previously informed the petitioner that he had practically no relatives living. The applicant's object in moving for the grant was to keep the goods in safe custody, safeguarding it until a next-of-kin had been found.

§ 3. Extent of Court's authority.—The Court may order the goods to be gathered up; or may authorize the collection of all personal property, giving discharges for the debts due to the estate, on payment of the same; it may also authorize the grantee to renew such leases as would expire before a general grant could be made; or the Court may take the matter in hand itself, and pay the debts of the deceased. Besides the authority to collect and preserve property, the Court may add other powers which shall seem necessary under the circumstances. But it seems the Court cannot sell, nor can empower any grantee to sell any property of the deceased. "The Court has only an authority, and no such power itself, and therefore it cannot give that power to any other [see *In re Radnall*, 2 Add. 232; *In re Clarkington*, 2 Sw. & Tr. 380] (1).

Recently, however, where it was for the benefit of the absent or unknown next-of-kin, the Court directed the administrator *ad colligenda bona* to dispose of the property or any portion of it by sale [*In re Schwerdtfeger*, L. R. 1 P. D. 424] (2). So the grant may be limited to any part of the deceased's property within the jurisdiction, as for instance, to sell a ship, to collect and get in outstanding debts; to sell a cargo, to endorse and receive the amount of bills of exchange and so forth (3).

§ 4. Miscellaneous.—The former practice was to make grants for the purpose of preserving the estate when it might be endangered by delay in administering, even without waiting for the application of persons entitled to the estate. But this practice is now obsolete. Now such grants are made, as already seen, for the purpose of collecting and preserving precarious and perishable property (4).

157. 41 (P)
225 (s).—When a person has died intestate, or leaving a will of which there is no executor willing and competent to act, or where the executor is, at the time of the death of such person, resident out of the Province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under ordinary circumstances would be entitled to a grant of administration,

Appointment as administrator of person other than the one who under ordinary circumstances would be entitled to administration.

(1) Wms. 451, 452; Bro. P. P. 197; Hend. 340; Tr. & Coote 165; Walker & Elg. 90.
(2) Wms. 451 (q); Bro. P. P. 198; Hend. 340; Walker & Elg. 91; Tr. & Coote 167.
(3) Tr. & Coote 165; Coote 157; Hend. 340.
(4) Tr. & Coote 164; Coote 156.

the Judge may, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as he thinks fit to be administrator ;

and in every such case letters of administration may be limited or not as the Judge thinks fit.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 5. <i>Where this section may be applied.</i> |
| § 2. <i>Court's power under this section.</i> | § 5a. <i>Some recent English cases.</i> |
| § 3. <i>"Necessary or convenient."</i> | § 6. <i>Where it does not apply.</i> |
| § 4. <i>Persons excluded from the grant.</i> | § 7. <i>The discretion how to be exercised.</i> |

§ 1. **The section.**—This section is founded upon section 73 of the Court of Probate Act, 1857 (20 and 21 Vict. C. 77). That section enacts.—

"Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit" (a).

§ 2. **Court's power under this section.**—By this section the most extensive and extraordinary powers have been conferred upon the Court to make, under any special circumstance, any grant which, it may think fit, to persons who would not but for this section be entitled to it (1). [See *Annapurna Dasi v. Kallyani Dasi* (1893), 1. L. R. 21 C., 164; *In re Kaminey Money Bewa* (1894), *Ibid*, 697; *In re Parbutty Dasi* (1897), 1 C. W. N. cxiv.]. It does not, however, empower the Court to make a merely arbitrary selection from among persons contending for the grant [*Haynes v.*

(a) The grant under this section is not necessarily a limited grant. It may be limited or not as the Court may direct. In several books of authority this section, *i. e.*, section 73 of the English Court of Probate Act, is placed under the head of general grants, and not limited grants. It seems this section forms, as if, a proviso to all grants in general.

(1) Bro. P. P. 176; Walker and Elg. 53.

Matthews, 1 Sw. & Tr. 462, 463]. Where, therefore, a good case is made out the Court may, under this section, pass over an executor and grant to a residuary legatee, or it may pass over an executor and a residuary legatee or residuary legatees, and grant to a pecuniary legatee or a creditor (1).

§ 3. "Necessary or convenient."—The condition *sine qua non* of the exercise of Court's discretion, "is the presence of such special circumstances in the case as render such a grant absolutely necessary, not convenient merely, as being a saving of time or expense to the applicant."—One of the most pressing special circumstances, would, evidently be the perishableness of the estate, but others may present themselves of almost equal force (2).

"Unless special circumstances of some nature can be shown, no exception will be made in favor of the applicant, and the ordinary rules of the Court must be followed [*In re White*, 2 Sw. & Tr. 457] (3). The insolvency of the estate (but see next para), the mere absence * * of the executor, or the convenience which an exceptional course would afford to the applicant himself, are not sufficient circumstances in themselves to induce the Court to depart from its established practice" (4).

In order to satisfy the Court that it is "necessary or convenient," general statements are not sufficient [*In re Cooke*, 1 Sw. & Tr. 267; *Re Bateman* (1871) L. R. 2 P. & D. 242] (5). "The applicant will probably have to prove that the appointment is 'necessary or convenient' by reason of the insolvency of the estate or other special circumstances, though the words italicised which occur in the statute are omitted in this act" (6). "Insolvency," says Mr. Justice Henderson, "it is to be observed, is not mentioned in the Indian Acts as a special circumstance which might render it necessary or convenient to make a grant, but it is probable that where it did exist the Court here would follow the English cases, and treat it as a special circumstance requiring them to act." It seems there is some conflict of opinion as to whether section 73 of the English Probate Act is applicable, except where the estate of the deceased is insolvent (7).

§ 4. Persons excluded from the grant.—As the grant must be to a person "other than the person who, &c." the Court will not grant administration under this section to a person entitled to a grant in another character, *e. g.*, a creditor [*In re Fairweather*, 2 Sw. & Tr. 588]; nor to the nominee of the persons entitled to the grant [*In re Richardson*, L. R. 2 P. & D. 244; *In bonis Hale*, L. R. 3 P. & D. 207. But see *In re Abinash Chunder Mitter* (7 C. W. N. ccxlv) in which the grant was made to a nominee of the person entitled]. In *Farrel v. Brownbill* [3 Sw. & Tr. 467], however, the Court granted administration under this section, with the consent of all parties interested, to their nominee, who took no interest in the property himself (8). But the circumstances of that case were peculiar, and administration was granted in order to stop litigation. The Court has no power under this section to direct that somebody else, who has no present interest in the estate, should be associated with the person who under sec. 23 (P) (*ante*) is legally

(1) Coote 72, 73; Tr. and Coote 75; Walker and Elg. 55; Wms. 453-54 (n).

(2) Tr. and Coote 74-75.

(3) Wms. 453 (u); Bro. P. P. 177; Walker and Elg. 53.

(4) Tr. and Coote 74-75.

(5) Bro. P. P. 177; Wms. 453 (u); Hend. 341.

(6) Stokes 152.

(7) Hend. 341.

(8) Wms. 453 (u); Bro. P. P. 176; Walker and Elg. 54, 55.

entitled to letters of administration [*Annapurna Dasi v. Kallayani Dasi*, I. L. R. 21 C., 164].

§ 5. **Where this section may be applied.**—(i) Where the only person entitled to the grant is resident of a distant country and immediate protection of the property is necessary. Thus in *In re Jones* [1 Sw. & Tr. 13], the grant was made to the father-in-law of the party entitled (1). [See *In re Cholwell*, 1 P. & D. 192; *In re The Hon. C. H. Cavendish* (1901) 5 C. W. N. cxxxvi].

(ii) Where the executor and universal legatee predecease the testator, and the next-of-kin being in a distant country cannot be found [*In re See*, 4 P. D. 86] (2).

(iii) Where the executor nominated in the will cannot be found [*In re Sawtell*, 2 Sw. & Tr. 448] (3).

(iv) Where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person [*Annapurna Dasi v. Kallayani Dasi*, *supra*; see *In re Abinash Chunder Mitter*, 7 C. W. N. ccxliiv].

(v) Where a prostitute dies intestate, letters of administration may be granted to her natural sister, although the tie of kindred with her had ceased on the deceased becoming a degraded woman. [*In re Kaminey Money Bewah* I. L. R. 21 C., 697; *In re Sowdaminey Dassee* (4). *In re Parbutty Dassee*, 1 C. W. N. cxiv].

Under this section, letters of administration *de bonis non cum testamento annexo* were granted to an executor who had renounced. [*In re Makhum Brahmanee*, 1899, 3 C. W. N. cccxxviii].

§ 5a. **Some recent English cases.**—The following are some of the most recent English cases in which the Court was of opinion that a grant under section 73 of the English Court of Probate Act (corresponding to this section) was justifiable :—

(a) To a creditor—*Re Autherton*, (1892) P. 104.

(b) To trustee in bankruptcy of sole next-of-kin—*Re Agnese*, (1900) P. 60.

(c) To residuary legatee—*Re Massey*, (1899) P. 270.

(d) To next-of-kin jointly with another—*Re Walsh*, (1892) P. 203

(e) To the partner of one of the executors of the will—*Re Taylor*, (1892) P. 90.

(f) To a member of the firm of accountants in London—*Re Suarez*, (1897) P. 82.

(g) To the son of a testatrix whose husband had deserted her 15 years before her death and had not been heard of since—*Re Shoosmith*, (1894) P. 23.

(1) Tr. & Coote 291; Wms. 453 (u); Bro. P. P. 177; Walker and Elg. 55.

(2) Tr. & Coote 291; Bro. P. P. 178; Walker and Elg. 57.

(3) Wms. 453 (u); Walker and Elg. 55, 57.

(4) Unreported. Decided 28th April, 1893.

(h) To a guardian of the intestate, his next-of-kin, a son, not having been heard of for 26 yeras—*Re Calticott*, (1899) P. 189.

(i) To attorney of one of two next-of-kings when both abroad—*Re Barton*, (1898) P. 11.

(j) To one of the deceased's sisters, where the deceased had been murdered by her husband—*In re Estate of Crippen*, (1911) P. 108.

§ 6. Where it does not apply.—This section cannot be applied for the purpose of dispensing with the rule requiring notice to the persons entitled to administration in priority to the applicant. [*In re Cooke* 1 Sw. & Tr. 267]. Nor can it be applied where there are such persons and they apply for it. [*Haynes v. Matthews*. 1 Sw. & Tr. 462, 463] (1). It is wholly inapplicable where there is no want of persons entitled to administration. [*Haynes v. Matthews, supra*] (2).

The mere bad character of the executor is no ground for exercising the discretion under this section [*In re Samson*, L. R. 3 P. & D. 48] (3).

§ 7. The discretion how to be exercised.—In exercising the discretion, the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court, is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distribution: the primary object is the interest of the property." [Sir J. Nicholl, in *Earl of Warwick v. Greville*, 1 Phillm. 125; see *In the goods of Abinash Chunder Mitter*, 7 C. W. N. ccxlv] (4).

Discretion "must be exercised within the limit, to which an honest man, competent to the discharge of his office, ought to confine himself" [Lord Halsbury, L. C. in *Sharp v. Wakefield*, 64 L. T. 180; (1891) A. C. 173].

The discretion should not be exercised if it is found the application is not *bona fide* [*Narendra Kumar Pramanick v. Charu Chandra Pramanick*, 7 C. L. J. 558; 12 C. W. N. 747; see *Louis Kunha v. Coelho*, 18 M. L. J. 158].

See *supra*, sec. 40 (P), § 1.

(d)—*Grants with Exception.*

158. 42 (P).
226 (S).—Whenever the nature of the case requires that an exception be made, probate of a will or letters of administration with the will annexed, shall be granted subject to such exception.

Probate or administration with will annexed subject to exception.

(1) Tr. and Coote 75; Coote 73; Walker and Elg. 55.

(2) Bro. 177; Wms. 453-54 (u).

(3) Coote 72 (F. note); Tr. and Coote 75 (F. note).

(4) Elg. 45; Flood. 695; Tr. and Coote 212; Wms. 432.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 4. <i>Where exceptions made.</i> |
| § 2. <i>Example.</i> | § 5. <i>Where exception not made.</i> |
| § 3. <i>"Subject to such exception."</i> | |

§ 1. **The section.**—This section is taken from Coote's Common Form Practice (1). See secs. 43 (P) and 48 (P) *post*.

§ 2. **Example.**—Thus, if a testator appoint one executor for a special purpose or a specific fund only, and another executor for all other purposes, the latter may take probate except that purpose or fund. Or, if there be no such other executor, the residuary legatee may take administration with the will annexed of the deceased's effects with the same exception (2).

§ 3. **"Subject to such exception."**—According to Mr. Henderson, (subsequently Mr. Justice) it seems, "such exception" includes not only exception as to representation or property, but exception with regard to a part of a will; as for instance, a passage or clause inserted in it, a name, or even a word, having no reference to any limitation as regards any property or representation of the deceased. He says, "In such cases (*i.e.* where any clause has been inserted in a will by fraud or forgery) probate, or letters of administration with the will annexed, is granted excepting the particular clause (referring to Indian Succession Act, sec. 226). So where words or clauses have been introduced into a will by mistake or accident, without the knowledge of the testator, the Court may admit the will to probate omitting such words or clauses" [citing *Harter v. Harter*, L. R. 3 P. & D. 11; *Morell v. Morell*, L. R. 7 P. D. 68; &c] (3). With profound respect for the opinion of the learned author, I venture to submit that, such words and clauses in a will are not to be excepted from probate by virtue of the provision of this section, but on account of the fact that they (such words and clauses) do not, according to law, being inserted without the knowledge of the testator, constitute anything testamentary (4). The same reason which will justify a Court in rejecting an entire will, would also justify it in rejecting a portion of it. A word or clause inserted in a will without the testator's knowledge, is no part of the will (5), and it would be rejected even if this section had not been enacted. Again, it is to be seen, that the *exception* under this section is to be made only "whenever the nature of the case requires," and not *whenever the law requires*. But the exception of the above mentioned words and clauses is made not because the nature of the case requires but because the law requires (see § 4, *infra*). Of course, where such a clause or word makes any disposition of property, or has reference to the representation of the deceased in time or estate, the exclusion or exception of such disposition or representation necessarily amounts to an exception of such clause or word. But where they do not operate to make such disposition or to have such reference, their exception would not, it seems, further the object of the section which is, exception of *grant* or *representation* only, irrespective of such word or clause. In Browne's Probate

(1) Coote 160; Tr. and Coote 169.

(2) Coote 160; Tr. and Coote 169.

(3) Hend 342.

(4) See Wms. 382; Tr. and Coote 95.

(5) See Bro. P. P. 123; also see, § 4, A (a), *infra*.

Practice it is laid down : "Where the representation of a deceased is divided by excepting a previous portion out of the residue, the supplemental grant is called a grant *Cæterorum*" (1).

In Tristram and Coote's Probate Practice, from which this section seems to have been taken, the rule is laid down in the following words :—

"Probate of a will, or letters of administration with a will annexed, will be granted, save and except any particular fund, whenever the nature and the law require such exception to be made" (2).

These authorities seem to preclude the possibility of such exception as Mr. Henderson refers to in the passage quoted above. It is worthy of notice that the word 'एव' which occurs in Tristram and Coote's book, has been omitted in this section. See sec. 48 (P), *post*.

§ 4. Where exceptions made.—

A. Of words and clauses in a will.—

(a) Where a clause is introduced in a will fraudulently, and the testator executes it being ignorant of its existence, such clause forms no part of the will, and probate will be granted omitting or excepting the clause [*In re Duane*, 2 Sw. & Tr. 590; *In re Oswald*, L. R. 3 P. & D. 162; *Girish Chandra De v. Rasharaj De*, 1 C. L. J. 109]. See *ante* sec. 48 (S), § 26, p. 119 and sec. 25 (P), § 6 p. 649 (3).

(b) Where a clause revoking all former wills was inserted by mistake and without any intention, it was ordered to be omitted from probate [*Marklew v. Turner* (1900), 5 C. W. N., cxxxvi; *In bonis Oswald*, *supra*, followed].

(c) Where a residuary legatee wrote her name, underneath the attestation clause of a will, but not as a witness, such name was omitted from the grant. [*In re Sharman*, L. R. 1 P. & D. 661] (4). So in *Shama Charan Kundu v. Khetromoni Dasi* [I. L. R. 27 C., 521, at 527; 4 C. W. N. 501], a clause, which was inserted in the will after it had been executed, and which bore no signature of the testator or of the witnesses, was excluded from the probate.

B. Of grant or representation.—Where an old woman who had merely lost her eye-sight, ordered her attorney to draw a will for her, and the attorney fraudulently inserted a clause bequeathing the residue to himself, and under various pretences kept the will back from her, the Court ordered the clause as to the residue to be struck out. Accordingly, probate was granted *save and except* the disposition of the residue [*Barton v. Robins*, 3 Phill. 455] (a) (5).

(a) In this case, it is submitted, although the clause was struck out, the exception was made so far as this section is concerned, not of the clause, but of the grant as regards the residue. In other words, the clause was struck out, not because "the nature of the case" required, but because the law required, that clause not being a portion of the will; and so soon as the clause was struck out, "the nature of the case" requiring, the grant was made subject to the exception of the residuary clause. Here there was a division of the representation in estate.

(1) Bro. P. P. 198; Wms. 532.

(2) Tr. and Coote 169; Coote 160.

(3) Bro. P. P. 123; Wms. 382; Hend. 342; Theob. 19, 3rd Edn.; 24, 5th Edn.

(4) Bro. P. P. 125; Wms. 383; Hend. 342; Theob. 28, 3rd Edn.; 32, 5th Edn.

(5) Bro. P. P. 123.

C. *Of offensive matter.*—The Court may in certain cases of special and definite character exclude from the probate offensive and libellous passages. In *In re Honeywood* [L. R. 2 P. & D. 251], the Court refused to omit from the probate a paragraph in a will which though offensive, was not calculated to injure. But in *In re Wartnaby* [1 Rob 423] and *Marsh v. Marsh* [1 Sw. & Tr. 528, 536] such passages were omitted (1).

§ 5. **Where exception not made.**—(a) Where the whole estate of the testator vests in the executor under section 4 (P) *ante*, no exception can be made under this section [*In re Thaker Madhavji Dharamsi*, I. L. R. 6 B., 460].

(b) Where a residuary legatee who prepared the will was directed to give further legacies which he intentionally omitted, and at the time when the will was read over and executed the further legacies were not present to the mind of the testator as the residuary legatee knew, it was held that the will was nevertheless entitled to probate [*Mitchell v. Gard*, 3 Sw. & Tr. 75] (2).

159. **43 (P)**
227 (s).—Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

Administration with exception.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Example.*

§ 3. *Administration with exception.*

§ 4. *Where grant under this section refused.*

§ 5. *Where such grant allowed.*

§ 1. **The section.**—This section and the last preceding section are alike. The former treats of administration with exception in cases of intestacy, the latter treats of probate or letters of administration with the will annexed in cases of testacy. In both, the grant is to be made under the same condition, *i. e.*, “Whenever the nature of the case requires.”

In Tristram and Coote's Probate Practice, the rule is laid down in these words: “So, where the nature of the case and the law require it, the Court will grant mere administration ‘save and except’” (3), (see § 3, *infra*).

§ 2. **Example.**—Where a testator has made his will for a particular or limited purpose only, (as appointing an executor for the administration of his property in some particular District or Country) and has died intestate as to all other property, his next-of-kin, without waiting for the executor to take the limited probate may take administration under this section, of all the deceased's effects, except what the testator has himself excepted (4). (See next para.)

(1) Wms. 383; Bro. P. P. 125; Hend. 342; Theob. 21, 3rd. Edn.; 24, 5th Edn.

(2) Wms. 362; Theob. 21, 3rd Edn.; 24, 5th Edn.

(3) Tr. and Coote 169; Coote 169-70.

(4) Tr. and Coote 169-70; Coote 161.

§ 3. Administration with exception.—This is also called administration or grant ‘save and except.’ It is the reverse of *Caterorum* grant or ‘grant of the rest’ (see next section). It precedes instead of following the particular or limited grant. When the grant follows the limited grant it is styled ‘grant of the rest,’ or *Caterorum* grant. Thus, if A be an executor for a special purpose or fund, and B an executor for all other purposes, and B takes out probate first, the grant to B is a grant ‘save and except’ the special fund or duty, or, as this (and the preceding section) section provides, “subject to such exception.” But if A being the limited executor, had taken out probate first, the grant to B would then have been *Caterorum*, or ‘grant of the rest.’ Hence it is clear, the difference between these two grants lies only in the order in which they are taken. In fact, these two grants are made for the same purposes and under the same conditions.

In practice, “the grants of probate and administration, *save and except* are usually made in the first instance without the parties waiting for the limited grants being taken” (1).

§ 4. Where grant under this section refused.—As a general rule, if Hindus take out letters of administration at all, they must take out general letters of administration for all property, moveable as well as immoveable. Ordinarily, therefore, they are not entitled to limited grants of administration; so that, no grant *save and except* or subject to exception, can be made to them, except under circumstances of an exceptional nature [*In re Ram Chand Seal*, I. L. R. 5 C., 2.; 4 C. L. R., 290; *In re Grish Chandra Mitter*, I. L. R. 6 C., 483; 7 C. L. R. 593; *Kadumbini Dasi v. Koylash Kamini Dasi*, I. L. R. 2 C., 431, distinguished; see *Thaker Madhavji Dharamsi*, I. L. R. 6 B., 460].

§ 5. Where such grant allowed.—In *In the goods of Suttya Krishna Ghoshal* (I. L. R. 10 C., 554), a limited grant of administration was allowed, the circumstances of that case being sufficiently special to take it out of the operation of the rule laid down above (*i. e.*, in *In re Ram Chand Seal*, &c.) These circumstances were :—

Certain joint property in which five brothers were interested being the subject of a suit in which the rights of all parties were fully ascertained and decreed, one of such parties, Cowar Suttya Krishna Ghoshal, who died after the decree, was declared entitled to a 5-30th share in the joint estate. Subsequently, several orders were made in the suit, such as, appointing a receiver, ordering partition, excluding certain properties from partition and directing an account.

On a partition, a 5-30th share in the properties ordered to be partitioned was allotted and made over to the guardian of the infant children of the deceased, the remainder of the unpartitioned property remaining in the hands of the Receiver. On the taking of account, it was ascertained that the deceased sharer had during his lifetime overdrawn from the joint estate, and that the sum so overdrawn by him would have to be made good out of the 5-30th share decreed to him. It appeared, however, that what had been allotted to him in severalty and was not in the hands of the receiver, would be insufficient to settle the charge

against the estate of the deceased. Besides, the interest of the parties that would have to be administered had virtually been sufficiently dealt with by the suits that were going on, and in effect there was no matter of administration to be performed with regard to the aforesaid 5-30th share. Thus there could be no object in vesting in the petitioners as administrator the property which had already been in the hands of the receiver. It was in these circumstances that the exception was made as prayed.

(e)—*Grants of the rest.*

160. **44 (P)**
228 (S).—Whenever a grant with exception of probate, or letters of administration with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

Probate or administration of the rest.

NOTES AND COMMENTARIES.

Grant Caterorum.—The grant under this section is technically called a 'grant *caterorum*.' "The probate or administration following upon a limited grant is *caterorum*." It is made when the testator has appointed an executor for a special purpose or a specific fund together with another executor for all other purposes and effects, and the first mentioned executor has taken his limited probate, the other may take probate of the rest of the testator's effects. So, where the deceased has made a will and appointed an executor for a special purpose, or for a specific fund or property only, and has died intestate in all other respects, his next-of-kin, after the executor has taken a limited probate of the will, are entitled to administration of the rest. Similarly where a limited administration has been granted of the estate of an intestate, his next-of-kin are entitled, under this section, to take administration of the rest of the deceased's estate (1).

There is no mention in the Act of a grant *caterorum* with the will annexed. But it admits of no doubt that here, as in England, if a limited grant has been previously made, the residuary legatee may at any time come in and take administration with the will annexed of the rest of the testator's effects (1). See secs. 42 (P) & 43 (P), *ante*.

(1) Coote 161, 162; Tr. and Coote 170, 171.

(f).—*Grants of effects unadministered.*

161. **45 (P)**
229 (s)

Grant of effects un-
administered.

—If the executor to whom probate has been granted has died leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

NOTES AND COMMENTARIES.

- | | |
|---|---|
| § 1. <i>Preliminary.</i> | § 7. <i>What Acts amount to administration or intermeddling.</i> |
| § 2. <i>"To whom probate has been granted."</i> | § 8. <i>What Acts do not so amount.</i> |
| § 3. <i>Where several executors.</i> | § 9. <i>Grant de bonis non on administrator's death.</i> |
| § 4. <i>Grant de bonis when to be made and on what principle.</i> | § 10. <i>"Has died."</i> |
| § 5. <i>De bonis grant and original grant</i> | § 11. <i>"May."</i> |
| § 6. <i>"Estate unadministered."</i> | § 12. <i>Rights and liabilities of an administrator de bonis non.</i> |

§ 1. **Preliminary.**—This section treats of what is called grant *de bonis non administratis*, or shortly *de bonis non* or simply *de bonis*, which is a species of grant limited in estate which the deceased had in his representative character (2). In other words, it is an administration "of the goods of the original testator left unadministered by the former executor" (3).

The subject of grants of effects unadministered (under this section) may be considered,—(a) with reference to the death of an executor, and (b) with reference to that of an administrator (4). This section deals with the former.

"It frequently happens, that after an executor has taken out probate, or an administrator a grant of letters of administration, with or without the will annexed, and before such executor or administrator has fully *carried out the provisions of the will*, or distributed the assets, as the case may be, his office is determined by his death, inability or the like. It then becomes necessary to

provide for the complete carrying out of the object for which the original grant was made. The Court in such a case * * * appoints a new representative"; and grants him administration *de bonis non*, as it is commonly called (5). For in such a case, the estate of the deceased "is absolutely unrepresented until some one comes forward and gets a grant of letters." [Macpherson J. in *De Souza v. Secretary of State for India*, 1874, 12 B. L. R. 423; O. C. J.]

(1) Coote 169.

(2) Bro. P. P. 183.

(3) Wms. 478.

(4) Wms. 477.

(5) Bro. P. P. 183; Coote 163; Tr. and Coote 172; Elg. 64.

It is clear, therefore, that all grants of whatever description may be followed by *de bonis non* administration. The following are instances in which *de bonis* grant may be allowed :—

All grants may be followed by *de bonis non* grant.

(a) Where a grantee of administration *ad litem* [see 38 (P.) *ante*] dies before the termination of the proceedings (1).

(b) Where an executor having taken probate of a copy or contents of a will [secs. 24 (P), 25 (P) and 26 (P), *ante*], or an administrator having taken letters with such copy or contents annexed, dies, leaving the estate unadministered (2).

(c) Where an administrator *Ceterorum* [sec. 44 (P), *ante*] dies without fully administering the estate (3).

(d) Where an executor or administrator who has taken a grant limited to a particular estate or fund [sec. 35 (P), *ante*], dies before that estate or fund has been fully administered (4).

(e) Where a lunatic for whose use and benefit administration has been granted [sec. 33 (P), *ante*] dies before full administration (5).

(f) Where an executor dies in the lifetime of his attorney-administrator [sec. 28 (P), *ante*] and before the estate has been fully administered by the latter (6).

(g) Where the sole minor, or all the minors, [secs. 31 (P), 32 (P), *ante*] (where there are several) die before attaining majority (7). See *post* § 9.

In all these cases, the *de bonis non* grant is to be made to those persons to whom the original grant might have been made according to the nature of each case. [See section 46 (P), *post*].

In England the estate of an executor being transmissible (8), where a sole executor dies having appointed an executor by his will, a grant *de bonis* becomes unnecessary. But no such transmission being allowable in this country the necessity of a grant *de bonis non* cannot be dispensed with upon the death of an executor before he has fully administered the estate. [*De Souza v. Secretary of State for India, supra.*] See sec. 11 (P), § 3, *ante*.

§ 2, "To whom probate has been granted."—Where an executor renounces probate, or where he survives the testator but dies without having taken probate, or being cited to take probate does not appear to such citation "the right of such executor wholly ceases and the representation of the deceased goes as if such executor had not been appointed" (9) [see section 19 (P), *ante*]. Therefore, it is only when the executor dies *after probate has*

(1) Tr. and Coote 179.

(2) Tr. and Coote 177.

(3) *Ibid.*

(4) Tr. and Coote 178.

(5) *Ibid* 174, 182, 184.

(6) *Ibid* 184.

(7) *Ibid* 183.

(8) Bro. P. P. 185; Wms. 258.

(9) Bro. P. P. 184; Wms. 259, 478.

been granted to him that an administration *de bonis non* can be granted under this section (1).

§ 3. Where several executors.—But where there are several executors and one of them dies after probate, the representation survives to the surviving executors, and *de bonis* grant is unnecessary. [See sec. 11 (P), *ante*.]

§ 4. Grant *de bonis* when to be made and on what principle.—It is only upon the death (2) of a sole executor or sole surviving executor after probate, and before the estate is fully administered, that an “administration *de bonis non* with the will annexed will be granted according to the principles already laid down [sections 18 (P) to 21 (P), *ante*], to the person or persons, or their representatives, who would have been entitled to it had no executor been appointed, or had the executor when appointed renounced, or died without taking probate, or been cited to take probate and failed to appear to such citation” (3). [See *In re Mary Hemming*, I. L. R., 23 C., 579; *Javerbai v. Kablibai*, I. L. R., 15 B. 396, at 328; *In re Patterson*, 2 C. W. N. cccix; *In re Makhun Brahmanee*, 3 C. W. N. cccxxviii]. In the case last cited the *de bonis* grant was made to a stranger, the executor having renounced. See *infra* § 10 and sec. 46 (P).

In cases of *debutter* property, administration *de bonis non* is required to be granted on the death of each *shebait* or *trustee* to the next succeeding trustee, for otherwise the estate would be left unrepresented [*Runjit Singh v. Jagannath Prosad Gupta*, I. L. R. 12 C., 375. See the facts of this case in § 6 *infra*.]

§ 5. *De bonis* grant and original grant.—The grant of administration with the will annexed which is made where the executor has died without having taken out probate, or renounced, or failed to appear on citation, is not a *de bonis non* grant, but it is *original* grant (see § 2, *supra*). So, where a sole executor or a sole surviving executor dies before probate but after having administered the estate in part, the administration that is granted is *original* grant and not grant *de bonis non*; “because, although the acts done by the executor are good [see sec. 12 (P) *ante*] the administering is an act *in pais*, of which the Court of Probate cannot take notice” (4). But, if an executor die immediately after taking out probate, without doing anything else, the grant that will follow will be a *de bonis* grant, and not an *original* grant; for, the very act of taking out probate amounts to administering [see § 7 *infra*], and the executor is, therefore, to be held to have died having administered in part. Thus it is plain that, broadly speaking, every first grant is *original* grant, though every second grant is not necessarily a grant *de bonis non*. See *infra* sec. 46 (P).

§ 6. “Estate unadministered.”—The question seems to be whether anything in relation to the deceased, or in which the deceased was interested remains undone. Where for instance, an administratrix applied for permission to mortgage certain property left by the deceased, alleging that it was necessary for the purpose of defending a suit, and to repair certain houses, as well as to meet certain other expenses; it was held, that inasmuch as there were no debts or legacies to be paid, the administration was at an end and the petitioner

(1) Bro. P. P. 184.

(2) See *infra* § 10.

(3) Bro. P. P. 185; Wms. 478, 479.

(4) Wms. 478; Bro. P. P. 183, 184.

was in possession of the properties of the deceased, her husband, not as an administratrix, but as his widow and heiress, and no such permission was necessary. [*In re Nursing Chunder Bysack* 1899, 3 C. W. N. 635]. Here it is clear that, at the time when the application was made there was nothing in relation to the deceased, *i.e.*, nothing in which the deceased was interested, the interest that was left being that of the widow, the heiress. Thus, as held in that case, where no debts or legacies remains to be paid, the administration is, generally speaking, at an end, that is, the estate is fully administered.

In *Ritchie v. Rees* [1 Add. 144] (1), the fact that a period of forty-five years had elapsed from the death of the deceased, was held to be sufficient, *in conjunction with the circumstances*, to raise the presumption* of the estate having been fully administered; that is to say, whatever interest there was in relation to the deceased, had all ceased to exist. In *Chandi Charan Mandal v. Banke Behary Mandal* [10 C. W. N. 432] such presumption was raised after the lapse of 20 years from the death of the testator.

In *Runjit Singh v. Jagannath Prosad Gupta* (I. L. R. 12 C, 375), the testatrix, Rani Annapurna, by her will dedicated certain immoveable property to the *sheva* of an idol, and constituted her daughter-in-law, Sreemutty Anandmoyee, *shebait*, and authorized her to appoint a *shebait* in her place, *i.e.*, the next *shebait*. Anandmoyee was also appointed an executrix by implication, and as such she obtained probate, and during her life fully represented the estate of the deceased, both as a trustee for the idol, and as an executrix under the will. She died, however, without appointing any *shebait* as directed by the will. The respondent *Jagannath Prosad Gupta*, sister's son of the testatrix, thereupon applied for grant of letters of administration in respect to the endowed property, and it was held, that under section 45 of Act V, 1881, such a grant could be made, inasmuch as no *shebait* having been appointed, there still remained some portion of the estate of the testatrix to be administered. In delivering the judgment of the Court their Lordships (Norris and Ghosh JJ.) said: "In the present case, there being an endowment created by the will in favour of the idol, the trust is of a perpetual character, and therefore the necessity of administration of the endowed property did not and could not cease with the death of the *shebait*, Anandmoyee. So long as an administrator is not appointed the estate would be wholly unrepresented." That is to say, the estate would be left *unadministered*. In this case the *sheba* is to be carried on according to the will of the deceased, so long as the endowment lasts, *i.e.*, in perpetuity. In the absence, therefore, of the death of the deceased as *legal personality*, the administration can never come to an end [see *Parmanandas Jivandas v. Venayekrao Wassudeo*, 1878, I. L. R. 7 B., 19 Cowell's I. A. 86].

Where a Hindu by his will bequeathed his landed property (self-acquired) to his infant son, appointing his wife executrix, who took out probate and died soon after, and the infant son sued the defendant by his next friend for arrears of rent, it was held, that letters of administration *de bonis non* should have been taken out by the plaintiff to entitle him to maintain the suit. Sir

* This presumption was made in an action for enforcing the exhibition of an inventory for which there being no statutory bar, reason and justice were held to prescribe some limitation. See Wms. 745, 10th Ed.

Arthur J. W. Collins, C. J., and Parker, J., of the Madras High Court said : "We are of opinion that, as the executrix died intestate and without having fully administered the trusts of the will, an administration of another sort becomes necessary. This is called administration *de bonis non*" [*Nara Simmlu v. Gulam Hussain Sait*, I. L. R. 16 M., 71].

§ 7. What acts amount to administration or intermeddling.*

A.—*Acts done by the executor in relation to the deceased's estate showing an intention to take upon himself the executorship.* [See *Magaluri Garudiah v. Narayana Rungiah*, I. L. R. 3 M., 359] (1).

The following are some such acts :—

- (a). The act of propounding a will and taking out probate (2). But mere application for probate amounts to nothing [*Mohamdu v. Pichery* (1894) A. C. 431.] See sec. 102 (P), *post*.
- Examples.**
- (b). The insertion of advertisement calling upon persons to send in their account and pay money due to the testator's estate [*Long v. Symes*, 3 Hagg. 771, 774] (3).
- (c). Taking possession of the testator's goods, and receiving debts due to the testator or releasing such debt (4).

Where a man being named as one of the executors, in answer to an inquiry as to who were the executors, wrote a letter saying that he and others were executors, it was held that this was sufficient to make him liable as executor [*Vickers v. Bell*, 3 N. R., 624] (5). See sec. 128 (S) §§ 4, 6, *ante*.

(d). Joining another executor who had taken out probate, in giving a power of attorney to one to file or continue a suit in respect of the testator's property [*Ayshabai v. Ebrahim Haji Jacob*, I. L. R. 32 B. 364; 10 Bom. L. R. 117; see *Rogers v. Frank*, 1 Y. & J. 402. See Wms. 1434, n. (k). 1626, n. (t).

B.—*Acts which make a man liable as executor de son tort*,† (6).

* "Administration"—"Administration" in its proper sense, consists in the legal proceedings necessary to satisfy the claim of creditors, next-of-kin, legatees, or whatever other parties may have any claim to the property of the deceased. Accordingly, until all such claims are satisfied administration is not complete [*Per Mookerjee, J.*, in *Baroda Prosad Banerjee v. Gajendra Nath Banerjee* (1909) 13 C. W. N. 557 at 572; 9 C. L. J. 383, at 403]. See *supra*, p. 621, F. n. (a).

† Section 265 of the Indian Succession Act which treats of executors *de son tort*, has not been incorporated in the Hindu Wills Act or the Probate and Administration Act. An executor *de son tort*, otherwise called an executor of his own wrong, is thus defined in that section :—

"A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong" (7).‡

- (1) Wms. 282; Bro. P. P. 148; Walker and Elg. 13, 14.
- (2) Walker and Elg. 14.
- (3) Wms. 283; Bro. P. P. 149; Walker and Elg. 14.
- (4) Wms. 282, 283.
- (5) Wms. 283; Walker and Elg. 14.
- (6) Wms. 282; Bro. P. P. 148; Walker and Elg. 14.
- (7) See Wms. 261; Bro. P. P. 148; Walker and Elg. 311.

The slightest circumstance of intermeddling will make a man executor *de son tort*; thus, taking a dog, or even milking the cows of the deceased, or taking possession of his bed-stead or Bible, will constitute one an executor *de son tort* (1). So it has been held that killing the cattle of the deceased, or demanding his debts will also make a man an executor of his own wrong* (2). (See *Magaluri Garudiah v. Narayana Rungiah*, I. L. R. 3 M., 359).

§ 8. **What acts do not so amount.**—"Every intermeddling with the goods of the deceased, or with the office and work of an executor, shall not be said to be such an administration as to amount to an acceptance of the executorship or administration, and so to make a man chargeable as executor or administrator" (3). Therefore, merely doing acts of necessity or of humanity, will not make one liable as executor or even an executor *de son tort*. Thus, locking up the goods for preservation, directing the funeral of the deceased in a suitable manner, making an inventory of his property, feeding his cattle, providing necessities for his children, and such other acts of kindness and charity, have been held to be acts which even a stranger may do without incurring any liability (4).

Repairing houses is not administering when there is no debt or legacy to be paid (*In bonis Nursing Chunder Bysack*, 3 C. W. N. 635).

Nor is a widow's maintaining herself an act of administration after she has taken out probate or letters with the will annexed [*Lakshmi Narain Chatterjee v. Nandarani Debi* (1908) 9 C. L. J. 116].

§ 9. **Grant *de bonis non* on administrator's death.**—There seems to be no provision in this act under this head. It is, however, clear that, if a sole administrator with or without will, die after grant, but before he has fully

Exceptions:—(1) "Intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong (8).

(2) "Dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his own wrong."

The term executor *de son tort* is used indifferently of those who "intrude themselves into the affairs whether of testates or intestates" Accordingly there cannot be an administrator *de son tort* (9).

* A person who takes possession of or intermeddles with the estate of a deceased person without being appointed an executor, is an executor *de son tort*, and is liable both under the Hindu and English law [see *Kana Kamuca v. Venkataatnam*, I. L. R. 7 M., 586; *Magaluri Garudiah v. Narayana Rungiah*, I. L. R. 3 M., 359; see also *Framji Dorabji Ghaswala v. Adarji Dorabji Ghaswala*, I. L. R. 18 B., 337; *Navasbai v. Pestonji Ratanji*, I. L. R. 21 B., 400; *Suddasook Kootary v. Ram Chunder*, I. L. R. 17 C., 620; and see the observations of Phear, J., in *Jogendra Narain Deb Roykut v. Temple*, 2 I., Jur. N. S. 224].

Intermeddling after order but before issue of probate, makes one executor *de son tort* (*Navasbnē v. Pestonji Ratanji*, *supra*).

(1) Wms. 261; Walker and Elg. 312.

(2) Wms. 261, 262.

(3) Shep. Touch. 467.

(4) Wms. 265-66; Shep. Touch. 467-68; Walker and Elg. 312.

(8) Wms. 261, 262.

(9) Walker and Elg. 311.

administered the estate, grant *de bonis non* will be made as in the case of a sole executor's death under similar circumstances (1).

Where letters of administration to the estate of an intestate were granted to the widow of the deceased, limited during the minority of her son, and the son died before attaining majority and before the estate had been fully administered, it was *held*, that letters of administration *de bonis non* to the estate of the deceased husband might be granted to the widow [*In the goods of Giris Chandra Mitter*, 6 C. W. N. 581].

As to the person entitled to administration *de bonis non* on the death of the original administrator, see sec. 46 (P), § 2.

§ 10. "**Hās died.**"—It seems, the office of an executor or administrator may be determined by causes other than death before any grant *de bonis non* can be made. In *In re Patterson* (2 C. W. N. cccix) such determination was caused by the original administrator's conviction and imprisonment, on account of which his letters of administration being revoked, grant *de bonis non* was made.

§ 11. "**May.**"—The word "may" in this section is not to be construed as merely permissive but as directory, and as showing the course which the Legislature intend should be adopted [*De Souza v. Secretary of State*, 12 B. L. R. 423].

§ 12. **Rights and liabilities of an administrator *de bonis non*.**—When such an administrator is appointed, he becomes the only representative of the party originally deceased, and the property fully vests in him, so that he has power to dispose of it "in such manner as he thinks fit." (See *In re Hemming*, 1896, 1. L. R. 23 C., 579). An administrator *de bonis non* succeeds to all the legal rights of the original administrator in his representative capacity [*Catherwood v. Chabond*, 1 B. & C. 150 and 154] and his title is sufficiently proved by the letters *de bonis non*, without the production of the letters granted to the original administrator (*Ibid*) (2).

If the original executor or administrator has fraudulently alienated the assets in collusion with the vendee for his own benefit, such assets will be considered in equity as unadministered and will pass to the *de bonis non* administrator, who may have the sale annulled [*Cubbridge v. Boatright*, 1 Russ. C. C. 549].

It follows, therefore, that upon the death, removal or resignation of an administrator or an executor, the successor may sue for and recover against him, his sureties and representatives, all property of whatever nature of the deceased, in his hands, and demand an account of any property converted or squandered, whether the debts have been paid or not, so long as any duty remains to be performed by an administrator. In other words, it is the duty of the successor in administration to recover the whole estate, to take possession of it and to demand accounts from the person who has preceded him in the administration [*Fotherley v. Pate* (1747) 3 Atk. 603; *Barada Prasad Banerjee v. Gajendra Nath Banerjee* (1909) 13 C. W. N. 557; 9 C. L. J. 383].

Any judgement or decree passed against the former grantee is binding upon the new grantee [*Bai Meherbai v. Maganchand*, 29 B., 96; 6 Bom. L. R. 853].

(1) Wms. 481; Bro. P. P. 187; Tr. and Coote 172; Coote 166.

(2) Wms. 479; Walker and Elg. 65, 99.

162. ^{46 (P)}_{230 (S)}—In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Rules as to grants of effects unadministered.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. “*The same rules as apply to original grants.*”

§ 3. *De bonis non grant with copy or contents of will annexed.*

§ 4. *Where grantee lunatic.*

§ 5. *Original grant.*

§ 1. **The section.**—“The Probate Act, after laying down in section 45 that in cases where the whole of the estate has not been administered by the executor, a new representative may be appointed for administration, provides in section 46 that in such cases the Court, in granting letters of administration, shall be guided by the same rules as apply to original grants, and shall grant administration to such persons only to whom the original grants might have been made” [*Runjit Singh v. Jagannath Prosad Gupta*, I. L. R. 12 C., 375, *per Norris and Ghosh, JJ.*] (1).

§ 2. “**The same rules as apply to original grants.**”—In making grants of letters of administration no distinction is made between original grant and a grant *de bonis non*. As regards such grants, the established principle of the English Court is, that “the administration shall be committed to him who has the greatest interest in the effects of the original intestate.” [*Re Pountney*, 4 Hagg. 289]. But this rule is not obligatory (2). The Court has a discretion in the matter and on sufficient grounds being shown will depart from the general practice. On this point Lord Penzance observes:—“There are three propositions established: The first is, that the Court is not bound by the Statute to make the grant to the party entitled in distribution. The second is, that the general practice that prevails would enable the party entitled in distribution to obtain the grant on application at the registry, the right of a party originally entitled being preferred to that of a party having a derivative interest (*e. g.*, the personal representative of the next-of-kin). The third proposition is, that the whole matter is in the discretion of the Court.” (In *In re Carr*, L. R. 1 P. & D. at p. 292). (3)

Where an ordinary administrator dies leaving a portion of the estate unadministered, it is the established practice in England to consider who were

(1) Tr. and Coote 172; Coote 166; Bro. P. P. 178.

(2) Wms. 482, 483 (u); Walker and Elg. 54.

(3) Bro. P. P. 188.

the next-of-kin at the time of the death of the intestate, and not who may happen to be the next-of-kin at the time of the grant *de bonis* (1).

In *In re Potter* [(1899) P. 265], the Court, having with the consent of all interested parties, made a grant with the will annexed to a stranger, on the ground (*inter alia*) that he had a special knowledge of the business of the deceased, on the death of such administrator, leaving a portion of the assets unadministered, made a grant *de bonis non* to his partner.

Section 73 of the Court of Probate Act, 1857 (20 and 21 Vict. C., 77), applies as much to grants *de bonis non* as to original grants (2). See *ante* sec. 21 (P) §§ 2, 4, and sec. 41 (P).

Where property was dedicated for the *sheva* of an idol, and the *shebait* or trustee having died without appointing the next *shebait*, the heir of the testatrix applied for letters of administration, it was held that, under section 46 Act V, 1881, read with sections 18 to 23 of the same, the applicant was entitled to the grant, "for, as heir, the original grant in respect to the *debutter* property might have been made to him." [*Runjit Singh v. Jagannath Prosad Gupta, supra*].

§ 3. *De bonis* grant with copy or contents of will annexed.—If an executor, having taken out probate of the copy or contents of a will, or an administrator, having taken letters with such copy or contents annexed, dies leaving the estate unadministered, letters of administration *de bonis non* (with the copy or contents annexed) will be granted "it being again shown that the original will has not been found or recovered or transmitted, according as the case may be." [See *ante* sections 24 (P), 25 (P) and 26 (P)]. But if the original will be forthcoming, grant *de bonis non* will be made with the original will annexed, upon such evidence as would be required in an original grant. (3)

§ 4. Where grantee lunatic.—Where a person being a lunatic or of unsound mind, cannot obtain *de bonis* grant, though entitled to it, such administration will be granted for his use and benefit to the same person to whom an original grant might have been made under the same circumstances. In such case the lunacy or unsoundness of mind is to be proved as in an original grant (4). The same rule applies where an administrator *caeterorum* dies without fully administering the estate, and also in cases of grants *save* and *except* and other grants. See *ante* sec. 45 (P) § 1.

Sir Whitley Stokes says, in reference to this section: "But this rule does not bind the Court to perpetuate an error. Where a correction has become necessary it will make the necessary variation. Thus in England, where the Probate Court erroneously considering that a testator had not disposed of his residuary estate, granted administration with the will annexed to one of the next-of-kin of a testator, it afterwards granted administration *de bonis non* to the person whom the Court of Chancery had in the meantime decided to be a residuary legatee." (*Warren v. Kelson*, 1 Sw. & Tr. 290) (5).

§ 5. Original grant.—See *ante* sec. 45 (P) § (5).

(1) Powl. and Oakl. 189, 4th Ed.

(2) *Ibid.*

(3) Coote 167, 173; Tr. and Coote 177, 182.

(4) Coote 168; Tr. and Coote 177.

(5) Stokes Act X, p. 154; Tr. and Coote 173.

163. **47 (P)**
231 (s).—When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Administration when a limited grant has expired and there is still some part of the estate unadministered.

NOTES AND COMMENTARIES.

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| § 1. <i>Supplemental or cessate grant.</i> | § 3. <i>Illustrations.</i> |
| § 2. <i>Supplemental or cessate grant and de bonis grant distinguished.</i> | § 4. <i>Miscellaneous.</i> |

§ 1. Supplemental or Cessate grant.—The grant under this section is called supplemental or *cessate* grant; it is also termed *second* grant, being a regrant of the whole of the personal estate of the deceased. Where the original grant is limited for any specified time, or until any specified event, the representation of the deceased effected thereby is the *whole representation*, although only for a time, and in such case, it is clear, no other grant can be made until such time has elapsed or the event or contingency happened. A grant, for instance, made under section 28 (P) or 31 (P), *ante, i.e.,* a grant *durante absentia* or *minore aetate*, is a grant of the whole representation, expiring on the return or coming of age of the party entitled (see *In re Giris Chandra Mitter*, 6 C. W. N. 581). Until, therefore, the party entitled returns, or arrives at age, he cannot apply for a general and regular grant. This general and regular grant is supplemental or *cessate* grant. It is an absolute and permanent grant, following a temporary one (1).

§ 2. Supplemental or Cessate grant and de bonis grant distinguished.—Both these grants are required when the deceased's estate has not been fully administered. But yet there is a distinction between the two. This distinction may be explained by the following passage from Browne's Probate Practice:—"Although the first grant (*i. e.,* grant limited in time) would seem to be equally determinable by the happening of the particular event, as by the death of the grantee, yet a distinction is taken between a supplemental or *cessate* grant and a grant *de bonis*; and rightly so, because, in the latter case, the grant was originally of the entire representation, the fee simple, as it were, of the representation; whereas, in the former, the original grant was a kind of leasehold of, or determinable estate in, the representation, determining of itself on the effluxion of time, or on the happening of a particular event. This distinction is not merely technical, for a *cessate* grant is a renewal

(1) Tr. and Coote 180; Coote 171; Bro. P. P. 109.

of the entire original grant, while a grant *de bonis* is only a grant of so much as is unadministered" (see *Abbott v. Abbott*, 2 Phillim 578) (1).

§ 3. Illustrations.—The following illustrations (2) may be deemed useful:—

(i) Where an executor appointed for a year takes probate, the grant ceases on the expiration of the year, and the substituted executor, if there be one, takes probate, which is *cessate* grant.

(ii) Where an administration with the will annexed is granted for the use and benefit of a lunatic executor, and such executor becomes sane, the grant ceases, and he may take probate of the will, under this section.

(iii) Where an administration with the will annexed is granted to a guardian for the use of an executor during his minority and such executor arrives at majority, the administration ceases, and probate is granted to him under this section.

(iv) Where in an administration granted as in illustration (iii), the guardian dies during the executor's minority, the administration ceases, and supplemental grant is made to a new guardian.

(v) Where an administration with the will annexed is granted to the attorney of the executor, and the executor applies for and obtains probate, such probate is a *cessate* or supplemental grant.

(vi) Where an administration is granted of the contents of a will limited until the original or an authenticated copy of the same is produced, the grant ceases on the original or an authenticated copy of the will being discovered and brought before the Court, and the probate of the original or of the authenticated copy which follows is a *cessate* grant.

(vii) Where an administration is granted *pendente lite*, the grant ceases on the determination of the suit, and the subsequent grant to the executor or next-of-kin is a *cessate* grant.

§ 4. Miscellaneous.—An administrator taking a grant under this section

Bond. is required to execute bond and give security to the same amount as the original administrator did in the first instance, although the estate might have been partly

administered (*Abbott v. Abbott*, 2 Phillim 578) (3).

(1) Bro. P. P. 199.

(2) Coote 172-74; Tr. and Coote 181-83.

(3) Wms. 532; Bro. P. P. 199; Tr. and Coote 180

CHAPTER IV.

ALTERATION AND REVOCATION OF GRANTS.

164. **48. (P)**_{232 (s)}.—Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

What errors may be rectified by Court.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 5. <i>Apparent result of the cases.</i> |
| § 2. <i>"Errors in names and descriptions, &c."</i> | § 6. <i>Mistake,—omissions and insertions.</i> |
| § 3. <i>"The purpose in a limited grant."</i> | § 7. <i>The general rule.</i> |
| § 4. <i>Illustrative cases.</i> | § 8. <i>Miscellaneous.</i> |

§ 1. **The section.**—This section contemplates three classes of errors, that is, (1) errors in names and descriptions, (2) errors in setting forth the time and place of the deceased's death, and (3) errors in the purpose in a limited grant. Of these the 1st and the 3rd are sufficiently comprehensive to include all possible errors. For instance, "names and descriptions," there being nothing to the contrary in the context, must be held to have reference to things as well as persons.

§ 2. **"Errors in names and descriptions, &c."**—For instance, where the surname or Christian name of the deceased has been misspelled, the status of the deceased misstated, or the time of the deceased's death or the value of the property misrepresented; "or where the administratrix being a spinster when sworn to the oath, has married before the grant is sealed; or the intestate is described as a bachelor without parent, but in fact died a widower without child or parent" (1). Alterations in respect of names or descriptions are not confined to those of the testator, but may be made in regard also to executors or administrators where omissions or mistakes have been made (2).

§ 3. **The purpose in a limited grant.**—As, for instance, where there has been a misdescription of the property which is to be administered, or a misrecital of the power under which a will has been made, or of a deed by which a trust has been created (3).

(1) Tr. and Coote 185; Coote 175; Bro. P. P. 264.
(2) See Coote 179.
(3) Tr. and Coote 185.

§ 4. **Illustrative cases.**—In *In the goods of White* [(1878) I. L. R. 4 C., 582] the probate was allowed to be amended by substituting the word “ward” for “white”; in *In re Towgood* (L. R. 2 P. & D. 408) by allowing a further description of the deceased to be added to it (1); and in *In re Allchin*, (L. R. 1 P. & D. 664) by ordering a memorandum to be endorsed on the probate, after it had issued, showing the true date of the will (2). So, in *Gerindra Kumar Das Gupta v. Rajeswari Roy* (I. L. R. 27 C., 5), error in the printed form of the probate was allowed to be rectified.

§ 5. **Apparent result of the cases.**—From the foregoing cases the following conclusions may be drawn:—(a) That the “error” must be in the probate or letters of administration; (b) that such error may or may not be independent of any corresponding error in the will; (c) that the error must be discovered after the grant has been made; and (d) that the error must not constitute or have reference to any disposition of property or representation of the deceased (a).

(a) If there is any error or mistake in the will, and it is discovered before the grant is made, such error, it seems, will be rectified as soon as it is discovered, so that, there will be no chance of its being incorporated in the grant. Thus in *In re Shuttleworth* [1 Curt. 911] (3), where the executor and universal legatee had been described in the will by a wrong name, and probate was given in the right name, there was no error in the grant, *i.e.*, the probate, but it was in the will, and was rectified as soon as it was discovered before the grant was made. If, however, the error had been discovered after the grant, the rectification would have resulted in the amendment of the probate and the case would come under the operation of this section. Hence it is said, “It will occasionally happen that after a grant has been made an error of some kind is discovered” (4).

But then it may be questioned, how can a will be amended, or any error in it rectified by the Court? In *In re Shuttleworth* (*supra*), it was with the consent of the testator’s next-of-kin that the error in the will was rectified. But it has been held—“The Court cannot, even by consent, order a passage of the will to be expunged, which the testator, being of sound mind, intended to form a part of it” [*Curtis v. Curtis*, 3 Add. 33]; nor can it “alter the will by substituting one name for another, however cogent the evidence of mistake may be” [*In re Collins*, 7 Notes of Cas. 278] (5).

As regards such rectification, the general rule seems to be that, “However clearly an error can be established in a will, unless words have been inserted by fraud or by mistake without the knowledge of the testator, the Court cannot correct it either by the omission of words or by the insertion of other words” [*Harter v. Harter*, L. R. 3 P. & D. 11] (6). See *ante* sec. 42 (P), § 4.

Thus it is clear that, where any word or passage has been inserted in a will by fraud or mistake and without the knowledge of the testator, such word or passage may be expunged by the Court before any grant is made. There is no provision in this Act or in the Indian Succession Act, specifically authorizing the Court to exercise any such power [see sec. 42 (P)]. But if the insertion of any such passage or word (*i.e.*, the error) be discovered after the grant has been made, and as a necessary consequence, after it has been embodied in the grant, the matter will come under the operation of this section, and the error being rectified, the grant will be altered or amended.

It may be remembered, as already seen, that, such word or passage will come under the operation of this section only if it does not constitute or has reference to any disposition of property or representation of the deceased. Should, it, however, constitute any such disposition or has reference to it or to the representation of the deceased, the matter will be one for the operation of sec. 42 (P), *ante*, and the word or passage will be excepted. See, however, note to sec. 42 (P).

What is the remedy when any such word or passage which should have been excepted, finds its way into the probate or letters of administration?

(1) *Ibid.* 186.

(2) Tr. and Coote 188; Hend. 345.

(3) Wms. 383.

(5) Wms. 383.

(4) Tr. and Coote 185.

(6) Bro. P. P. 125.

§ 6. Mistake,—omissions and insertions.—According to Sir E. V. Williams, *the result of the authorities* is, that where there is (a) “some absurdity or ambiguity, on the face of the will ascribable to something either omitted or inserted”; and (b) “clear and satisfactory proof that the insertion or omission was contrary to the intention of the testator,” the Court is at liberty to pronounce for the will “not in its actual state, but with such error first reformed or corrected, either by the insertion of the passage omitted, or by the omission of that inserted.” [*Bayldon v. Bayldon*, 3 Add. 232, 238; *Travers v. Miller*, 3 Add. 226; *Mitchell v. Gard*, 3 Sw. and Tr. 75]. The important point is, that there must be a clear mistake or a clear omission, demonstrable from the structure and scope of the will (*Mellish v. Mellish*, 4 Ves. 49; *Phillips v. Chamberlain*, *ibid* 51, 57 (1).

Thus it appears that, as decided by the English Courts, the Court may strike out words or clauses proved to have been inserted by mistake, but cannot insert anything whatsoever, even though something be proved to have been left out by mistake or inadvertence. In a recent case, therefore, where the word “revenue” was inserted in a will by mistake for the word “residue,” Sir F. Jeune struck out the word “revenue” but refused to insert “residue” in its place [*Re Scholt*, (1901) P. 191]. So, it has been held that a word or words inserted by mistake may be struck out even if it leaves the will senseless [*Re Boehm*, (1891) P. 247].

§ 7. The general rule.—It may be stated as a general rule, that a mistake arising from inadvertence or fraud, may be rectified where the word or clause was not read over by or to the testator, or brought sufficiently to his notice. Thus where a testator wished two sums of £10,000 each to be settled for the use of two daughters and their children, and by a mistake the name of the same daughter appeared in each of the two clauses settling the sums and it was found that the will was not read over to the testator, probate was granted with the omission of the name in one of the clauses [*Re Boehm*, *supra*; see *Briscoe v. Hamilton*, (1902) P. 234; *Re Gordon* (1892) P. 228; *Re Moore*, (1892) P. 378; *Collins v. Elstone*, (1893) P. 1].

§ 8. Miscellaneous.—If the original grant is lost or is inaccessible, a notation or alteration may be made upon an exemplification of it (2).

Where an administrator applies to amend the grant by increasing the amount of the deceased's property, further security from him would be required (3).

165. 49. (P)
203 (S).—If, after the grant of letters of administration with the will annexed, a Codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

Procedure where
codicil discovered
after grant of admin-
istration with will
annexed.

(1) Wms. 362; Kerr's Fraud. 379.

(2) Coote 178.

(3) Belch. 281, Rule No. 703.

NOTES AND COMMENTARIES.

§ 1. *The section*§ 2. *Addition of incorporated paper.*

§ 1. **The section.**—This section is similar to section 10 (P) *ante*, which provides for cases of discovery of codicil after grant of probate. In England no distinction is made as to whether such discovery is made after probate, or after letters of administration. So, the same rule governs both (1).

§ 2. **Addition of incorporated paper.**—If an unattested or unexecuted paper, incorporated by the testator in his will, should have been omitted from the probate, the probate may be amended by engrossing the incorporated document into it (2).

166. $\frac{50 (P)}{234 (S)}$

**Revocation or
Annulment for Just
Cause.**

—The grant of probate or letters of administration may be revoked or annulled for Just Cause.

Explanation : “Just Cause” is :—

1st, that the proceedings to obtain the grant were defective in substance ;

2nd, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ;*

3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ;

4th, that the grant has become useless and inoperative through circumstances ;

5th, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Act, or has exhibited under that Chapter, an inventory or account which is untrue in a material respect. See sec. 11, Act VI of 1889.

Illustrations.

- (a) The Court by which the grant was made had no jurisdiction.
- (b) The grant was made without citing parties who ought to have been cited.
- (c) The will of which probate was obtained was forged or revoked.

* False suggestion may be made in ignorance (3).

(1) Tr. and Coote 54-55.

(2) *Ibid.*

(3) 14 L. of Eng. 213.

(d) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.

(e) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.

(f) Since probate was granted, a later will has been discovered.

(g) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.

(h) The person to whom probate was, or letters of administration were granted, has subsequently become of unsound mind.

NOTES AND COMMENTARIES.

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| <p>§ 1. <i>Preliminary.</i>
 § 2. <i>Jurisdiction.</i>
 § 3. <i>"Just cause."</i>
 § 4. <i>Other just causes.</i>
 § 5. <i>Locus standi.</i>
 § 6. <i>Locus standi of executor.</i>
 § 7. <i>Locus standi of the Crown.</i>
 § 8. <i>Objection on ground of locus standi.</i>
 § 9. <i>Nature of the interest.</i>
 § 10. <i>Where there is locus standi.</i>
 § 11. <i>Where there is no locus standi.</i>
 § 12. <i>Bar to revocation suit.</i>
 § 13. <i>Effect of acquiescence and delay as a bar.</i></p> | <p>§ 14. <i>Effect of compromise as a bar.</i>
 § 15. <i>Procedure.</i>
 § 16. <i>Onus.</i>
 § 17. <i>Review.</i>
 § 18. <i>Effect of revocation.</i>
 § 19. <i>How probate may be impeached in an ordinary Civil Court.</i>
 § 20. <i>"Explanation."</i>
 § 21. <i>Grantee's death, effect on revocation.</i>
 § 22. <i>Miscellaneous.</i>
 § 23. <i>Whether revocation proceedings are suits?</i></p> |
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§ 1. **Preliminary.**—after a grant has been made, the Court is not necessarily or absolutely a *functus officio*; for it possesses and exercises, whenever it becomes necessary, the power of revoking or annulling a grant which it has made. And in so doing the Court only resumes the powers which it parted with on false or fraudulent suggestion (1)

* A probate or letters of administration may be revoked either by a suit (a) brought in the Court of Probate, or by an appeal to a higher tribunal. In

(a) A suit or action for revocation may be initiated in two different ways and on two different grounds, as will appear from the following:—

First, such "just cause" as does not affect the validity of the will, as for instance, informality or irregularity of procedure—An action upon this ground may be initiated by motion on notice [*In re Harendra Krishna Mookerjee*, 5 C. W. N. 383; see *Re Mohendra Narain Roy*, *Ibid*, 377].

It appears that when revocation is sought on this ground the informality or irregularity being established, the probate will be recalled, and then the party who obtained probate will be required to prove the will *de novo* and in solemn form. [See *Elokeshi Dassi v. Hurry Prosad Soor*, 1 L. R. 30 C., 528; 7 C. W. N. 450; *Kalidas Chuckerbutty v. Ishan Chandra Chuckerbutty*, 1 L. R. 31 C., 914, 917; 9 C. W. N. 49; also see *Brindabon Chandra Shaha v. Sureswar Shaha Pramanick* 10 C. L. J 263].

(1) Tr. and Coote 197.

England, a suit for revocation is styled a "suit by citation," which may be defined to be a proceeding whereby the executor or administrator is cited before the judge by whom the grant was originally made, to bring in the probate or letters, and to show cause why they should not be revoked (1). Such suits are now called "actions."

Probate and letters of administration cannot be avoided except by judicial sentence. Hence a second grant is not a repeal of the first without such sentence; and the Court will not make a new grant before the grant originally made is revoked. (*Rains v. Commissary of Canterbury*, 7 Mod. 146, 147) (2).

Probate when irrevocable.—Probate granted in *solemn* form is irrevocable, (a) where all the parties adversely affected by it have been parties or privies to the proceeding in which it was granted [see *Newell v. Weeks* (1814) 2 Phillim. 224; *Wytcherley v. Andrews* (1871) L. R. 2 P. & D. 327; *Young v. Holloway* (1895) P. 87; *Re Bhuggobutty Dasi* (1900), 27 Cal. 927; 4 C. W. N. 757; *Saradakant Das v. Gobindmohan Das* (1910), 12 C. L. J. 91; *Kunja Lal Chowdhury v. Kailash Chandra Chowdhury* (1910) 14 C. W. N. 1068]; (b) where such proceeding was quite legal and fair—free from anything fraudulent or collusive; and (c) where there is no later will (3). See sec. 69 (P), § 2, *post*.

§ 2. Jurisdiction (b).—The test of jurisdiction which is to be made use of in applications for grant of probate, is also to be applied in cases in which

The general rule is that any party whose interest is adversely affected by a probate or letters with the will annexed granted in common form, *i. e.*, *ex parte*, may without limitation as to time, call it in, and put the party who obtained it, or his representative, upon proof of the will in solemn form [*Hoffman v. Norris*, 2 Hill. 231; *Merryweather v. Turner*, 3 Curt. 802, 817. See *Dayabhai Tapidas v. Damodar Tapidas*, 1 L. R. 20 B., 227; 21 B., 75; *Madhab Chunder Giri v. Bhayaram Panday*, 1 L. R. 22 C., 92; *Elokeshi Das v. Hurry Prosad Soor*, 7 C. W. N. 450; see also *Harendra Krishna Mukerjee*, *supra*, and *Re Mohendra Narain Roy*, *supra*]. In any such case if the executor or administrator with the will annexed, as the case may be or his representative, fails to prove the will sufficiently, the grant is revoked (4).

This is in accordance with the practice in England where revocations are made either on motion or by action *i. e.* suit according as the grounds on which such revocations are sought, are any irregularity of procedure or invalidity of the will (5). This being so, perhaps the correct view is that, as stated above, where the ground on which the revocation is sought does not affect the validity of the will, the proceeding is miscellaneous, and where such ground is one touching the validity of the will, it is a suit [see *post*, sec. 83 (P) §].

Secondly.—Such just cause as affects the validity of the will, as for instance, fraud, forgery, undue influence, &c. A suit on this ground may be initiated by a regular suit [*Re Harendra Krishna Mukerjee*, *supra*].

Where revocation is sought on ground of fraud, the person guilty of fraud, may not be a party to the proceedings. The reason is that, although as a general rule, a judgment obtained by fraud can be set aside only as against the person who was guilty of fraud, yet, inasmuch as, the will is good or bad against all the world, the rule does not apply in an action to set aside a judgment granting probate [*Birch v. Birch* (1902) P. 130 C. A.] (6)

(b) The word "jurisdiction" means either the local jurisdiction of a Court, or its pecuniary jurisdiction, or its jurisdiction with reference to the subject-matter of a suit; or it may mean the legal authority of a Court to do certain things. [See *Mohesh Ch. Das v. Jahiruddin Mollah*, 5 C. W. N. 509; *Golap Singh v. Indra Kumar Hazra*, 9 C. L. J. 367, 374].

(1) Wms. 391-92, 578; Tr. and Coote 353, 356, 359-360.

(2) Wms. 581-82, 8th Ed.; 451, 10th Ed.

(3) Bro. P. P. 99; Tr. and Coote 354; Wms. 582.

(4) Wms. 582, 340; Walker and Elg. 109; Tr. and Coote 363.

(5) Tr. and Coote, 197, 202, 297, 420; Powl. & Oak. 343, 350, 368.

(6) 14 L. of Eng. 213, n. (n).

a revocation of probate is demanded. This test is, whether or not the deceased, at the time of his death, had his fixed place of abode, or had some property, moveable or immovable, situate within the jurisdiction of the particular District Judge in whose Court the application is made [see sec. 56 (P), *post*]. Thus where after the grant of probate the place of residence of the deceased was transferred from Rajshaye to Pubna, it was held that the Court at Pubna was competent to entertain a suit for the revocation of the probate granted by the Rajshaye Court. [*Kamona Sundery Dasee v. Hurro Lall Shaha*, I. L. R. 8 C., 570].

As regards jurisdiction meaning legal authority the general rule is, that the Court which granted probate is the only Court which has jurisdiction to revoke it. For, "The grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction" [*Komullochun Dutt v. Nil Rutton Mundle*, I. L. R. 4 C., 360]. That is to say, the grant must be contested by a suit in the Court out of which the grant issued and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction [*Mayho v. Williams*, 2 N. W. P. H. C. R. 268]. This is the legal consequence of the exclusive jurisdiction of the Court of Probate. In the mofussil the District Judges are the sole Courts of Probate. [See the observations of White J. in *Nobeen Chander Sil v. Bhaba Sundery Dabee*, I. L. R. 6 C., 460 at pp. 462-63; also see *Mayho v. Williams*, 2 N. W. P. H. C. R. 268, at 274].

Hence no regular suit lies to set aside the order granting probate [*Komullochun Dutt v. Nil Rutton Mundle*, I. L. R. 4 C., 360], although such a suit will lie where the Court refuses probate [*Ganesh Jagannath Dev v. Ramchandra Ganesh Dev*, I. L. R. 21 B., 563].

The Probate Court has no jurisdiction to institute proceedings of its own motion to revoke probate [*Sarat Sundary Barmani v. Uma Prasad Roy*, 8 C. W. N. 578].

§ 3. "Just cause."—The explanation of the words "just cause" appended to this section, is not illustrative merely, but exhaustive (see § 20, *infra*). Hence mismanagement or maladministration by the executor [*Annada Prosad Chatterjee v. Kalli Krishna Chatterjee* I. L. R. 24 C., 95, followed in *Gourchandra Das v. Sarat S. Dassya* (1912) 40 C., 50; 16 C. W. N. 880; *Thomas v. Butler*, 1 vent. 219), or his unfitness or incompetency (*Hara Coomer Sircar v. Doorgamoni Dasi*, I. L. R. 21 C., 195) is not a just cause. So, taking to immoral course of conduct and in consequence thereof becoming excommunicated from the community to which the testator belonged, even if such conduct is against the express provisions of the will, is not a just cause within the meaning of this section [*Mohundas v. Luchmundas*, I. L. R. 6 C., 11].

Omission to cite a proper party is a just cause [*Rebells v. Rebells*, (1897) 2 C. W. N. 100; *In re Gunga Bissen Munhra* (1898) 2 C. W. N. 607; *In the goods of Gopimohan Bysack*, and *In re Nemaichand Bysack*, 5 C. L. J. 560; *Shoroshibala Debi v. Anandmoye Debi*, 12 C. W. N. 6; *Haritaran Sarker v. Basanta Kumari Debi* (1909), 14 C. W. N. 1vi; see illus. (6)]. Where letters of administration were granted without citing an executor who had not renounced, it was held that the absence of such citation was a just cause* [*Hormusji*

* Absence of citation is a "just cause" only where such citation is imperative or compulsory as distinguished from discretionary [*Digamber v. Narayan* (1910) 13 Bom. L. R. 38]. See *supra*, sec. 16 (P) § 3 & *infra* sec. 69 (P) § 7.

Novroji v. Bai Dhanbaiji, I. L. R. 12 B., 164]. But where, the person to whom a citation has not been issued is otherwise aware of the proceedings, mere absence of special citation is not a *just cause*, [*Premchand Das v. Surendra Nath Saha*, 7 C. W. N. 190], even if he be a minor [*Nistarini Dabya v. Brahmomoyi Dabya*, 1890, I. L. R. 18 C., 45. See *Rebells v. Rebells*, *supra*]. If, however, there has been fraud or collusion on the part of the guardian [see *Nistarini Dabya v. Brahmomoyi Dabya*, *supra*], or perhaps gross negligence [see *Lalla Sheo Churn Lal v. Ramnandan Dobey*, I. L. R. 22 C., 8; *Cursandas Natha v. Ladkavahu*, I. L. R. 19 B., 571], the grant will be revoked. See sec. 69 (P), *post* and § 19, *infra*.

Citation upon a minor represented by the petitioner for probate as guardian whose interest is adverse to that of such minor, is not a valid citation [*Shoroshibala Debi v. Anandmoyee Debi*, *supra*].

In *In re Patterson* (2 C. W. N. cccix) conviction and imprisonment of the administrator, who was found guilty of criminal breach of trust (*no way connected with the deceased's estate or with the administration in his capacity of such administrator*), were held to be a *just cause*, and letters of administration granted to him were revoked. The revocation, in this case, though there is no direct authority on the point, was evidently made because the grant had become useless and inoperative through circumstances (*Per Mr. Justice Jenkins*).

No grant shall be revoked merely by reason that the testator or intestate had no fixed place of abode, or no property, within the district at the time of his death. [But see *In re Rose Anne D'Silva*, 1903, I. L. R. 25 A., 355]. See sec. 61 (P), *post*.

Nor is grant to be revoked for mere omission to file an inventory or account [*Premchand Das v. Surendra Nath Saha*, *supra*]. But see *post*, § 20, Expl. 5th.

Where letters of administration in a case governed by the Mitakshara were granted to the brother of the deceased, and the latter's widow applied for an order that such letters be brought into Court and cancelled and administration be granted to her, on the allegation that the deceased was not joint with her brother, the defendant, and the assets left by him constituted his separate property, to which she, as heiress was entitled, the allegation of the defendant being that he was joint with the deceased, and the assets left by him constituted joint-family property to which he was entitled, it was held that, inasmuch as it is not the practice of the Court of Probate to go into the question of title or whether the property left was separate or joint, the allegation of the widow that there was separate property was sufficient. The letters granted to the brother were accordingly ordered to be cancelled, and administration granted to the plaintiff, the widow. [*In the goods of Raghoobur Hazam v. Bahadoor Hazam*, 3 C. W. N. cclxxvii—*per Sale J.*]

Non-compliance with the conditions on which consent may be given for a grant of probate, in common form, is not a *just cause*. Thus it was held that, "probate of a testamentary paper, in the nature of codicil, having been granted by consent, in common form, could not afterwards be revoked on the allegation that the conditions on which such consent was given had not been complied with." [*Nicol v. Ashew*, 2 Moo. P. C. C. 88] (1). Similarly,

consent of all parties interested that the revocation will be for the benefit of the estate, is no ground of revocation even if the grantee may have done nothing by virtue of the grant [*In re Hislop*, 1 Rob. 457];—much less where he has intermeddled [*In re Reid*, 11 P. & D. 70] (1).

Where upon administration being granted with the consent of the caveator, the latter applied for revocation on the ground that his consent had been obtained by fraud, it was held this was a *just cause* within the meaning of this section [*Kalyani Dasi v. Mukunda Lal Mondol*, 3 C. L. J. 37 n.].

Coming too hastily is an irregularity amounting to *just cause*; so that grant of letters of administration taken before the expiration of 14 days from the death of the intestate [sec sec. 80 (P), *post*] may be revoked (2).

Where a creditor having obtained an administration *cum testamento annexo*, and completely settled his own debt, went away, it was held, this was *just cause*, and the administration was revoked [*In re Jenkins*, 3 Phill. 33; *In re Bradshaw*, 13 P. D. 18] (3).

Where a tenant for life of certain property assigned over his interest to the remainder-man, letters of administration which had been granted to him limited to his life interest, was revoked, and a new administration granted to the remainder-man (*In re Ferrier*, 1 Hagg. 241) (4).

Granting an administration pending *caveat* is a *just cause* (5). Where an administration with the will annexed was obtained after a *caveat* had expired, but without notice to the adverse party, and while a suit touching the validity of that will was pending in another Court, it was held that the grant was surreptitiously obtained and it was revoked [*Trimbletown v. Trimbletown*, 3 Hagg. 243] (6).

§ 4. Other just causes.—

(i) Where the Court of Construction, after grant made, differ from the Probate Court in its construction of the will, the grant will be revoked by the latter Court, and a fresh grant will be made to the party entitled according to the construction of the former Court [*Warren v. Kelson*, 1 Sw. and Tr. 290] (7).

(ii) Where after the grant of administration to one of several residuary legatees, the grantee absconds and is not heard of for five years, the administration will be revoked and grant *de bonis non* made to another residuary legatee. [See *In re Covell*, 15 P. D. 8; *In re Bradshaw*, 13 P. D. 18] (8).

Where an administrator of a small estate had gone to New Zealand, taking the grant with him, the court, with the object of avoiding delay and expense, revoked the grant and made a fresh grant *de bonis non* without notice to the administrator and without requiring production of the original grant [*Re Williams Thomas* (1912) P. 177].

(1) Walker and Elg. 111; Wms. 589; Tr. and Coote 203.

(2) Wms. 584; Walker and Elg. 110.

(3) Wms. 586; Tr. and Coote 200; Walker and Elg. 111.

(4) Tr. and Coote 200; Walker and Elg. 112.

(5) Walker and Elg. 110.

(6) Wms. 587; Tr. and Coote 198; Walker and Elg. 110; Bro. P. P. 307.

(7) Tr. and Coote 199.

(8) *Ibid* 201.

(iii) Where letters of administration are granted after the renunciation of the executor who has intermeddled, and such executor is subsequently compelled to take out probate, the letters will be revoked (1).

(iv) Where application is made for probate by two or more executors, and one dies before the grant is sealed (2), or where a grant has passed the seal after the party applying is dead (3), the grant will be revoked.

(v) If, after administration with the will annexed has been granted a codicil is discovered, a separate grant cannot be made of the latter as in the case of probate [sec. 10 (P), *ante*]; but the administration must be revoked and a new administration granted with both the will and the codicil annexed (4). But see *ante* sec. 49 (P), and also sec. 33 (P).

(vi) Where after letters of administration had been granted to the Administrator-General, the universal legatee and executrix according to the tenor of the will applied for probate, it was held, the latter was entitled to an order for revocation of the letters [*In the goods of Courjon*, I. L. R. 25 C., 65. *Re Pungard*, L. R. 2 P. & D. 369 and *Re Adamson*, L. R. 3 P. & D. 253, followed].

Where an executor who has proved in common form is called upon to prove in solemn form, but he refuses to do so, this being a renunciation of probate, the probate is revoked. [See *Re Mooney* (1879) L. R. Ir. 3 Ch. D. 281] (5).

§ 5. Locus standi.—A person who is entitled to oppose the grant, is also entitled to apply for revocation; and a person is entitled to oppose, and enter *caveat* when he claims to have any interest in the estate of the deceased and such interest is adversely affected by the will [see *Nobin Chandra Sil v. Bhaba Sundary Dabee* (1880), I. L. R. 6 C., 460 at 464; *Kamona Sundary Dassee v. Harro Lall Shahu* (1882), I. L. R. 8 C., 570 at 575; *In re Mee Tsee*, 15 W. R. 351]. Therefore, one must have sufficient interest in the estate of the deceased in order that he may be entitled to apply under this section, for revocation of probate or letters of administration (6). Accordingly, the widow of a predeceased son having no interest in the estate, has no *locus standi* [*Re Gobind Chandra Babaji* (1912), 17 C. W. N. 1141. See *Bajinath Shahu v. Desputty Singh*, I. L. R. 2 C., 208; 25 W. R. 489; *Komollochun Dutt v. Nilruthun Mundul*, I. L. R. 4 C., 360; *Kamona Sundary Dassee v. Harro Lall Shaha*, *supra*; *Nilmoney Singh v. Umanath Mookhopadhya*, I. L. R. 10 C., 19; *Rahamtullah v. Rama Ran*, I. L. R. 17 M., 373]. As to what constitutes sufficient interest, Mr. Justice Field says: "Any person has a sufficient interest who can show that he is entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of section 242 of the Indian Succession Act" (or section 59 of of this Act) [*Nobeen Chandra Sil v. Bhaba Sundary Dabee*, *supra*]. But this view has been dissented from in *Abhiram Dass v. Gopal Dass*, I. L. R. 17 C., 48.

§ 6. Locus standi of an Executor.—An executor who has proved the will cannot be allowed to take proceedings to revoke the probate; for it is

(1) Tr. and Coote 199.

(2) Bro. P. P. 264.

(3) Tr. and Coote 199.

(4) Tr. and Coote 201.

(5) 14 L. of Eng. 214.

(6) Wms. 339; Bro. P. P. 286-87.

(7) Wms. 590; Walker and Elg. 112.

his duty to uphold the will and not to destroy [*Srinath Ghose v. Mukundram Chakravarti*, 12 C. W. N. 573; *In bonis Chamberlain* L. R. 1 P. & D. 316] (7). But an administrator may, if he should discover that the deceased left a will. [See *Elme v. Da Costa*, 1 Phill. 173] (1).

The chief difficulty in the way of an executor applying for revocation lies in the fact, that he has no interest in the estate of the deceased except on the footing of the will being a valid one. On this ground an executor is very justly precluded from impeaching the genuineness of the will [*Srinath Ghose v. Mukundram Chakravarti*, *supra*].

But where one of several executor's name was inserted fraudulently in the petition for probate and in the *vakalatnamah* without his knowledge, and he applied for revocation of the grant on the ground of the will being a forgery, it was held that under the circumstances he was entitled to have his name removed from the probate [*Ibid*] (a).

An executor who is also a next-of-kin may apply for revocation after having proved the will [*Williams v. Evans*, 40 L. J. 356].

The grant may be revoked where the executor or administrator becomes incapable of acting by reason of insanity or ill health [see *Re Ponsonby* (1895) P. 287] (2).

§ 7. Locus standi of the Crown.—It seems, as held in America, that in the absence of any other person interested to oppose the grant, the Crown is entitled to contest the validity of a will on ground of incapacity or undue influence [*State v. Lancaster*, 119 Tennessee, 638; see *Davis v. Davis*, 2 Add. 223].

§ 8. Objection on ground of locus standi.—Objection as regards the interest of the person applying for revocation, that is, as regards his *locus standi*, should be taken at the earliest opportunity; and if the question of such interest be in issue, such issue must be first determined [*Mayho v. Williams*. 2 N. W. P. H. C. R. 268].

§ 9. Nature of the interest.—"Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper" (3) [*Kipping v. Ash*, 1 Rob. 270, cited in *Rahamtullah Sahib v. Rama Ran*, 1 L. R. 17 M., 373]. But this possibility should rest on existing facts and not on mere conjecture. In *Crispin v. Doglione* (2 Sw. & Tr. 17) it was held by Sir C. Cresswell, "that the possibility of filling a character which would give the party concerned an interest was not sufficient, but that there must be a possibility of having an interest in the result of setting aside the will" [see *Rahamtullah Sahib v. Rama Ran*, *supra*].

'Interest,' must have reference to the estate of the deceased from the point of view of the person claiming such interest. One denying the title of the testator and claiming adversely to him, cannot be said to have any interest in the estate of the deceased. Thus it was held in *Abhiram Dass v. Gopal Dass* [(1889) 1 L. R. 17 C., 48, followed in *Srigovind v. Laljhari Koeri* (1909) 14

(a) What, if a sole executor comes and proves that he did not apply for probate and the proceedings were throughout behind his back ?

(1) Walker and Elg. 52 112.

(2) 14 L. of Eng. 214.

(3) Wms. 342.

C. W. N. 119; *Phirojshah v. Pestoni* (1910) 34 B., 459; 12 Bom. L. R. 366], that a person not claiming any of the property of the testator, but disputing the right of the testator to deal with certain property as his own, had not such an interest in the estate of the deceased as would entitle him to come in and oppose the grant of probate. [*Baistab Charan Shaha v. Gangasagar Shaha*, 1 C. L. J. 258] (a). See sec. 69 (P).

The following points may serve as useful tests for determining whether a person has sufficient interest :—

1st.—Whether if there be no will, the claimant has a good title? [See *Kishen Dai v. Satyendra Nath Dutt*, (1901) I. L. R. 28 C., 441].

2nd.—Whether the interest of the claimant is such as would entitle him to maintain a suit in respect of the matter covered by the will?

3rd.—Whether, in case the claimant is not allowed to come in, he will be entirely without a remedy?

§. 10. Where there is locus standi.—

(i) A person interested by assignment in the estate of the deceased, has *locus standi*. Thus where a person was the purchaser from the widow of the deceased, and a will was set up and proved at variance to his interests by the testator's brother, it was held that such person was entitled to apply for revocation, because, as Mr. Justice Markby said, he was interested by assignment in the estate of the deceased, and if there was no will he had a good title [*Komolochan Dutt v. Nilruttun Mundle*, 1878, I. L. R. 4 C., 360; *Lalit Mohan Bhattacharjee v. Navadip Chandra Kaparia*, I. L. R. 28 C., 587; *Sheik Azim v. Chandranath Namdas*, 8 C. W. N. 748].

(ii) Where a judgment-creditor attached the property of the deceased which had devolved upon his son, the debtor, and a will was set up, it was held by the Calcutta High Court that the judgment creditor had *locus standi*, the will purporting to divert the succession from the debtor to another person [*Umanath Mookhopadhyaya v. Nilmoney Sing* (1881), I. L. R. 6 C., 429; *Kishen Dai v. Satyendra Nath Dutt*, I. L. R. 28 C., 441; *Arakal Bastian Ausap v. Narayana Aiyar* (1910) 34 M., 405]. In appeal their Lordships of the Judicial Committee said: "Assuming that a purchaser from an heir can oppose the grant of a probate or apply to have it revoked (which their Lordships do not decide) they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors." [*Nilmoney Sing v. Umanath Mookhopadhyaya*, 1883, I. L. R. 10 C., 19, at P. 27; I. L. R. 10 I. A. 80].

Where, therefore, the case is founded on the ground that the probate has been obtained in fraud of creditors, a creditor, whether attaching one or not, is entitled to apply for revocation [*Lakhi Narain Shaw v. Multan Chand* (1912) 17 C. L. J. 230; 16 C. W. N. 1099].

(a) In this connection see *Bloor v. Platt*, [78 Ohio. 46] where it was held that any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of a testator's estate as would be impaired or defeated by his will, or who would be benefitted by setting it aside, is entitled to contest the validity of such will. Thus a judgment creditor who has attached property, which in the absence of a will, would belong to his debtor as heir by descent, is a person interested within this rule. It is noticeable, however, that the general creditors of a person, who would inherit property covered by a will are not so interested and cannot be allowed to contest the validity of that will [see *Lockard Stephenson*, 74 Am. St. Rep. 63].

So, in *Surbo Mongola Dassi v. Shashi Bhooshun Biswas* [1884, I. L. R. 10 C. 413], it was held that an attaching creditor (a mortgagee of a portion of the property covered by the will) was entitled to oppose the grant of probate, on the ground that the will was set up in fraud of creditors [*Nilmoney Sing v. Umanath Mookhopadhyaya, supra*, followed. According to Messrs. Phillips and Trevelyan, *Nilmoney Sing's* case is not applicable to *Sarba Mongola's* case] (1).

(iii). Bhaba Sundary Dabee, the widow of the deceased, propounded a will which purported to postpone the inheritance of her sons, Parbutty Charan and Hari Charan, until after her death. The application was opposed by N., who claimed as an attaching creditor of Parbutty, and by B and O who claimed as mortgagees under a mortgage executed by both the sons. It was held that, all the three claimants N, B and O, had *locus standi*, and were entitled to oppose the grant of probate, on the ground that, if these *caveators* were unable to contest the validity of the will, they would be entirely without a remedy. As regards the mortgagees, Mr. Justice White was of opinion that, they stood substantially in the same position as the plaintiff in *Komulochun's* case (*supra*), being purchasers *pro tanto* and assignees of the immoveable estate of the deceased, although only for the limited purpose of securing money which they had advanced to the testator's heirs [*Nobeen Chandra Sil v. Bhaba Soondery Dabee*, 1880, I. L. R. 6 C., 460].

A mortgagee of the testator's estate may oppose or support a grant [see *Kashi Chandra Deb v. Gopi Krishna Deb*, 1891 I. L. R. 19 C., 48]. So a purchaser from the executor (*Ibid*).

(iv). A presumptive reversioner (the sister's son of the testator) to property with which a will deals, has been held to have sufficient interest to give him a *locus standi*, although such reversioner has no present transferable interest in the property left by the deceased [*Brindaban Chandra Shaha v. Sureswar Shaha Paramanick*, 10 C. L. J. 263; *Kamona Soondary Dassee v. Hurro Lal Shaha*, 1882, I. L. R. 8 C., 570; *Nobeen Chandra Sil v. Bhaba Soondery Dabee, supra*; *Bepin Behari Shaha v. Manoda Dasi*, 6 C. W. N. 912; see *Khettramoni Dassi v. Shyama Churn Kundu*, I. L. R. 21 C. 339]. But this must be understood subject to the qualification that when the reversioner claims independently of the will, or where the testator or testatrix affects to deal with the property claimed by the reversioner without having any right to do so, the latter has no *locus standi*. Thus where a widow by making a will affected to dispose of her husband's property, and one claiming to be the reversionary heir of her husband entered caveat to oppose grant of probate of that will, it was held, that the caveator had no *locus standi* [*Baistab Charan Shaha v. Gangasagor Shaha*, 1 C. L. J. 258]. It may be remarked that, here the caveator did not claim any interest in the estate of the testatrix, the widow; nor was he without any remedy (§ 6, *supra*).

(v). The widow of a Hindu testator has sufficient interest even during the lifetime of her two minor sons, to call upon the executor in her own right, to prove the will in *solemn* form, because she is entitled to maintenance and to have her right to it made a charge upon the estate of her deceased husband by the institution of a suit [*Brinda Choudhrani v. Radhica Choudhrani* 1885, I. L. R. 11 C, 492; *In re Amrita Lal Mallick*, I. L. R. 27 C., 350].

But the testator's adoptive father's widow has no such interest [*Garabini Devi v. Protap Ch. Shaha*, 4 C. W. N. 602].

(1) See Phillips and Trevelyan, 375-76, F. note, 1st ed.

(vi). Where a *Bynapatra* (1) or deed of earnest money was executed by one of the heirs *ab intestato* of the deceased testator on receipt of part payment, in favour of one K and others, agreeing to sell to them a portion of the property which in the event of intestacy would devolve upon him; it was held that, by this transaction the respondents, K and others, acquired an interest in the estate, such as would entitle them to apply for revocation [*Muddun Mohun Sirkar v. Kali Churn Dey*, 1892, I. L. R. 20 C. 39; *Komulochun Dutt v. Nilruttun Mundle*, *supra*, followed in principle; see also *Lalit Mohun Bhattacharjee v. Navadip Chunder Kaparia*, I. L. R. 28 C., 587]. It follows, that a purchaser from an heir of a portion of the deceased's property, must have *locus standi*, and so it was held in *Digambor v. Narayana* [(1910) 13 Bom. L. R. 38].

(vii). Where a Hindu died leaving a widow and a daughter, and the widow in collusion with the petitioner for probate, withdrew her opposition, the daughter was held to have *locus standi* to contest the will. [*Khettra Moni Dasi v. Shyama Churn Kundu*, 1894, I. L. R. 21 C., 539].

(viii). Where there are two wills of two different dates, and probate of one has been granted in *common* form, the executor of the other, is entitled in the same way as the next-of-kin would be, to call upon the executor of the former will to prove it in *solemn* form and to cross-examine the witnesses in support of it [*In re Taramoni Dasi*, 1898, I. L. R. 25 C., 553].

(ix). In *Arkal Bastian Ausup v. Narayana Iyer* [(1910) 34 M., 405; 1 M. W. N. 819] it was held that the judgment-creditors of the deceased's son two of whom had attached the son's interest, had such interest as entitled them to oppose the grant of probate.

Where there is a contest between two rival claimants, each asserting a preferential title, the nearer according to the rules of inheritance has the right to oppose a grant and has *locus standi*. Thus where a half-sister's son of a widow and the daughter's son, of the great grandson of the great-great-grandfather of her husband, opposed the grant of probate of a will executed by her; it was held, the former being heir to her Stridhan in preference to the latter, he had *locus standi* [*Shashi Bhushan Lahiri v. Rajendra Nath Joardar* (1912) I. L. R. 40 C., 82]. In this case the former was the executor who applied for probate and the latter opposed the grant of such probate. So the latter was held not to have *locus standi*.

§ 11. Where there is no *locus standi*.—(1) A creditor of the deceased has no *locus standi*. "He cannot controvert the validity of a will; for it is indifferent whether he shall receive his debt from an executor or an administrator" (2) [*Menzies v. Pulbrook* 2 Curt. 845; *Rahamtullah v. Rama Rau* 1894, I. L. R. 17 M., 373]. If, however, a creditor has already had a grant of administration, he has a *locus standi*, as in that case he is the same for the purpose of opposing the will as a next-of-kin (3).

(ii) A legatee has no right to impugn the will which gives him a legacy, and to call for proof of it in *solemn* form. But proof of a former will of the testator in which such legatee is interested has been held to give him a *locus standi*. [*Rahamtullah v. Rama Rau*, I. L. R. 17 M., 373].

(1) See section 54, Act IV, 1882 (Transfer of Property Act).

(2) Wms. 343; Walker and Elg. 52.

(3) Bro. P. P. 294; Walker and Elg. 52, 112.

(iii) In *Bajinath Shahai v. Desputty Singh* [I. L. R. 2 C., 208; 25 W. R. 489], a Hindu testator died, leaving B, alleged to be his adopted son, and C. who would be his heir in default of adoption, and made a will of which B applied for probate; it was held that the creditors of C. were not parties having any interest in the estate of the deceased. This was held to be correct by the Privy Council in *Nilmoney Sing v. Umanath Moorkhopadhyaya* [I. L. R. 10 C., 19, at P 26].

(iv) The tie of kindred between a woman's natural family as well as her husband's family and herself is severed when she becomes degraded and an outcaste [*In re Kamineymoney Bewa* I. L. R. 21 C., 697; *Sarnamoyee Bewa v. Secretary of State for India in Council* I. L. R. 25 C., 254; 2 C. W. N. 97; *Bhutnath Mondol v. Secretary of State for India*, 10 C. W. N. 1085. But see *Subharaya Pillai v. Ramasami Pillai*, I. L. R. 23 M., 171; *Narain Das v. Tirlok Tewary* I. L. R. 29 A., 4; 3 A. L. J. 537]. Where, therefore, probate of the will of K a woman of the town, was granted to D, it was held that K's husband's sister's son had no *locus standi* to apply for revocation of the same. [*In re Kamineymonee Bewa*, 1894, I. L. R. 21 C., 697]. See *ante*, sec. 23 (P) and *post* sec. 41 (P).

(v) The illegitimate son of a Sudra in Bengal, though entitled to maintenance, has no interest sufficient to entitle him to oppose the grant of probate of the will of his father [*In the goods of Sarat Chander Patra*, deceased, *Choonee Lal Gossuami v. Prosonno Coomar Patra*, 1898, 2 C. W. N. cclvi].

(vi) One claiming as reversionary heir has no *locus standi* when he claims independently of the will, that is, when he claims no interest in the estate of the testator who affects to dispose of property by will having no right to do so [*Baistab Charan Shaha v. Gangasagar Shaha*, 1 C. L. J. 258]

(vii) The widow of a predeceased son has no *locus standi* [*re Gobind Chandra Babajee* [(1913) 17 C. W. N. 1141]. See *supra*, p. 708, last para.

§ 12. Bar to revocation suit.—The limitation Act (Act XV of 1877) is not applicable to an application for revocation of probate [*In re Ishan Chandra Roy*, I. L. R. 6 C., 707, &c. See section 55 (P), *post*].

Accordingly, if there is nothing special, an application for revocation may be made at any time after the grant [*Merry Weather v. Turner*, 3 Curt. 802]. The general rule is that, where a will has been proved in Solemn form, the executor is not to be compelled to prove the same any more (2). But it is not the mere fact of the grant being in Solemn form that precludes a party from compelling the executor to prove the will anew [see the observations of Markby J, in *Komullochun Dutt v. Nilruttun Mundle*, I. L. R. 4 C., 360, at p. 364]. It is only when the party so applying has had notice of the previous proceedings, and did not appear to contest, *having reason to do so*, that the law prevents him from applying for revocation, by calling upon the executor to prove the will again [*In re Bhuggobutty Dasi*; *Prosunnomoyee Dassee v. Adhore Chandra Dutt*, (1900) 4 C. W. N. 757; I. L. R. 27 C., 927; *Sarada Kant Das v. Gobind Chandra Das* (1910) 12 C. L. J. 91; *Kunjatal Chowdhury v. Kailash Chandra Chowdhury* (1910) 14 C. W. N. 1068] (1). Thus where the petitioner having once entered *caveat* and withdrawn declining to proceed with the case, came afterwards with a petition on the ground that, some experts

had discovered facts which would go to establish forgery, it was held this was not sufficient to entitle him to reopen the case. [*In re Pitamber Girdhar*, I. L. R. 5 B., 638; *Newell v. Weeks* 2 Phill. 224; *Radcliffe v. Barnes*, 2 Sw. and Tr. 486. But see *Goddard v. Smith* L. R. 3 P. D. 7, where almost under similar circumstance the plaintiff was allowed to proceed with the case]. But, if it be made out that the circumstances leading the petitioner to believe that the will was not genuine had not come to his knowledge till after the grant of probate, the petitioner will be allowed to apply for revocation, even if he were aware of the previous proceedings [*Brinda Chowdhurani v. Radhica Chowdhurani*, I. L. R. 11 C., 492; see *Nistariny Dabya v. Brahmomoyi Dabya*, I. L. R. 18 C., 45]. So, if the petitioner had no reason to apply when the previous proceedings came to his notice [*In re Bhuggobutty Dassi*; *Prosunno-moyee Dassee v. Adhore Chandra Dutt*, *supra*] (a).

The fact that a person makes an application jointly with the executor for the benefit of the estate which such executor represents, is no bar to his subsequently being able to apply for revocation of the probate which that executor obtained. Where, therefore, the widow of the deceased had, after the grant of probate, joined the executrix who was an imbecile, in an application before the Court of Wards, with the object of getting the estate out of the hands of the executrix, and it was objected that such application amounted to a ratification, it was held, that the petitioner was not barred, such application not amounting to ratification. [See *Brinda Chowdhurani v. Radhica Chowdhurani*, *supra*].

§ 13. Effect of acquiescence and delay as a bar.—It has been held in England that a next-of-kin or other party whose interest is adversely affected by a probate, is not barred by lapse of time or acquiescence, or by the receipt of legacies, from requiring executors to prove a will in *solemn* form [*Merryweather v. Turner*, 3 Curt. 802; *Bell v. Armstrong*, 1 Add. 370]. But long acquiescence unaccounted for and acts done under the will, may operate as a bar [see *Hoffman v. Norris*, 2 Phillim. 230, in a note to *Newell v. Weeks*, *supra*; also *Merryweather v. Turner*, *supra*]. So, where a minor represented by his mother effected a compromise and applied to the Court for sanction, but the Court passed no order sanctioning the same, and the minor arriving at majority for four or five years acquiesced in the terms of the compromise and then applied for revocation of the probate which had been granted to his opponent because of such compromise; it was held, that he was barred by acquiescence and delay from contesting the will [*Kunjajal Chowdhury v. Kailash Chandra Chowdhury* (1910) 14 C. W. N. 1068; see *Hoffman v. Norris* (1805) *supra*; *Mohan v. Broughton* (1900) p. 56].

The above rule applies to all cases even where the application is, not one strictly under this section, being merely intended to compel the executor to

(a)—In a case plaintiff obtained probate in a contested suit and defendant applied for review on discovery of new evidence. This was rejected. The defendant then applied for revocation under this section on ground of undue influence. This ground was not set up previously but the fact on which it was based were urged in the application for review. It was held the defendant was not barred, because the Legislature not having fettered the right to apply under this section the Courts are not at liberty to fetter it. It was also held, that the English rule to the effect that, when once probate in Solemn form has been granted, no one who has been cited or taken part can have it cancelled, did not apply. Nor did the rule of *res judicata* operate as a bar [*Cecilia King v. Arthur*, 13 Burm. L. R. 325].

This ruling, so far as *res judicata* is concerned seems to be of doubtful authority. See *post*, sec 55 (P), § 4 & 62 (P) § 8.

prove the will in Solemn form [see *Kalidas Chuckerbutty v. Ishan Chandra Chuckerbutty*, I. L. R. 31 C., 914, 917; 9 C. W. N. 49].

§ 14. Effect of compromise as a bar.—Although a probate obtained in common form as the result of a compromise is binding upon the parties to such compromise, it is not binding on those who are not parties to it even though they may have been cognisant of the proceedings. For, as Lord Penzance pointed out, persons who are willing to stand by while a contest is going, are bound by the decision of the Court, but they are not bound by a compromise in which no decision in fact has been arrived at by the Court [*Wytcherley v. Andrews* (1871) L. R. 2 P. & D. 327; *Kunjatal Chowdhury v. Kailash Chandra Chowdhury*, *supra*]. See *post*, sec. 83 (P), § 7.

§ 15. Procedure (a).—It appears that, although sections 70 (P) to 73 (P) and 83 (P) indicate that where the grant of probate is opposed by a *caveator* the proceedings are to be in the form of a suit, there is nothing in this Act as to what procedure is to be followed in a revocation case, or a case where a grant has already been made and it is sought to set aside that grant. As to how the trial is to be conducted after the proceedings have been initiated, there seems to be hardly any doubt. But, as to how the proceedings are to be initiated in a case under this section, the practice has not been uniform; nor does the law give any clear indication. It seems to be clear, however, that regard being had to the meaning of the words "just cause" as explained

(a) In *Komolochun Dutt v. Nilrutton Mundle* (I. L. R. 4 C., 360) the following rules were laid down by Mr. Justice Markby for the guidance of the Mofassal Courts:—"The duty of a Judge, upon an application being made to him under this section, somewhat depends on what has passed on the previous grant of probate. Clearly, however the first thing for him to do is to direct notice to be given to the executor and all persons interested under the will or claiming to have any interest in the estate of the deceased. It is also clear from section 261 of Act X of 1865 (section 84 of Act V, 1881) that the executor will be the plaintiff in the regular suit which the Judge will then have to try; and the object of this is clear. It is in order to enable the Judge, if he thinks proper, to call upon the executor to prove the will again in the presence of the objector, notwithstanding the prior probate, just as in England he may be called upon to prove the will in solemn form. But a discretion is left to the Judge. When there had been already full enquiry as to the genuineness of the will, the Judge would probably take, as he would have a right to take, the previous grant of probate as *prima facie* evidence of the will, and so shift the onus on to the objector. But if there had been no previous contention, and the will had only been proved summarily, or in what is called common form in England, that is, without any opposition, and merely *ex parte*, to the satisfaction of the Judge, who can know nothing of the circumstances or the state of the family, then he ought in all ordinary cases to have the will regularly proved afresh, so as to give the objector an opportunity of testing the evidence in support of the will before being called upon to produce his own evidence to impeach it" (1).

These rules do not seem to be exhaustive. What his Lordship means as regards regular suit is, that the grant of probate cannot be questioned in an ordinary civil suit. He did not mean to lay down that probate cannot be revoked by a regular suit brought in the Court by which the grant was made (*In re Harendra Krishna Mukerjee*, *supra*).

In *Protap Chandra Shaha v. Kali Bhanjan Shaha* (4 C. W. N. 600) it has been held that a revocation suit is a miscellaneous proceeding.

Where the previous grant was *ex parte*, i. e., in common form, the procedure laid down in section 108 of the Code of Civil Procedure ought to be followed, and the petitioner should in the first instance be given an opportunity of proving that he had no knowledge of the previous proceedings. [*Dintarini Dabi v. Diboo Chandra Ray*, 1882, I. L. R. 8 C., 880; 11 C. L. J. 100.—*Per Field J.*].

and illustrated in this section, the initiatory steps are to be conducted in two different ways, according to the nature of the grounds on which relief is sought. Where the ground or the "just cause" is one not necessarily affecting the validity of the will, proceedings should be initiated by *motion* (a) on notice; but where the ground is one touching the validity of the will, the proceeding must be instituted by a regular suit brought in the Court by which the probate was granted. No such proceeding should be initiated by a rule *nisi* (b) [*In the goods of Harendra Krishna Mukerjee*, 5 C. W. N. 383; *In the goods of Mohendra Narain Roy*, *Ibid.* 377. *Komolochun Dutt v. Nilruttun Mundle*, *infra*, distinguished]. See *supra*, p. 700 n. (a).

When an application for revocation is made, the proper order to make is to allow the application under this section if there are good grounds for revocation, and then to recall the probate before the propounder is called upon to prove the will in solemn form [*Brindaban Chandra Shaha v. Sureswar Shaha Paramanick*, 10 C. L. J. 263.]

§ 16. **Onus.** (c)—The general rule is, that the *onus* lies in every case upon the party propounding the will; and it is his duty to satisfy the Court, that

(a) **Motion and rule.**—There are certain proceedings which may be resorted to at any time during the progress of a suit, or independently of it. These are termed *interlocutory* or *incidental* proceedings, and are introduced or initiated by what is called *motion*.

A *motion* is therefore, application to the Court, by the parties or their counsel, in order to obtain an order (or rule), directing, in favour of the applicant, some act to be done or abstained from by some other person; which order or rule, when obtained, is served upon the party affected by it. A motion is usually supported by an 'affidavit' establishing the truth of certain facts upon which such motion is grounded, and it is made either *ex parte* or on notice to the other side (1).

The rule so obtained is either a rule to *show cause* commanding the party, on a certain day therein named, to show cause why he should not perform the act, or submit to the terms therein set forth; or it is a rule *absolute* in the first instance, commanding the thing to be done, without the appointment of any day to show cause (2). A rule to show cause is usually granted on motion *ex parte* (3).

(b) A rule is said to be made *nisi* when it is not to be of force unless the party against whom it is made fails within a certain time to show cause against it. A rule *nisi* is one issued on motion (4) *ex parte* or without notice (5).

(c) The question of *onus* in a suit for revocation of probate, may be considered under two heads. First, "just cause"; and secondly, the *factum* of the will.

First, "just cause."—If it is correct to say that the making of a *prima facie* case gives jurisdiction to the Court to call upon the other party to prove the will *de novo*, that is, in solemn form [see *Prem Chand Das v. Surendra Nath Shaha*, 9 C. W. N. 190; *Durgagati Debi's case*, 33 C., 1001; 10 C. W. N. 955], it must be conceded that as a general rule, where an application is made for revocation under this section and on ground of some "just cause" as therein explained, it is the duty of the petitioner to start his case first and make out a *prima facie* case on the basis of the alleged "just cause" [see *Kalidas Chuckerbutty v. Ishan Chandra Chuckerbutty*, 1 L. R. 31 C., 914; 9 C. W. N. 49]. It is very clear, that it is only the "just cause" which gives the Court jurisdiction to exercise its power under this section; so that where there is no *prima facie* case of a "just cause," the Court is powerless and must hold its hand. But, where the previous proceeding was *ex parte*, is not the petitioner also bound to show that he had no knowledge of such proceedings or that he had no reason to enter his appearance and contest the grant [*Dintarini Dabi v. Daibo Chandra Roy*, 1 L. R. 8 C., 880; 11 C. L. R. 190; *contra*, *Prem Chand Das v. Surendra Nath Shaha*, 9 C. W. N. 190]. Again, if the petitioner's *locus standi* is challenged, is it not

(1) 3 Steph. 607, 608-9; Law. Stud. 754.

(2) Steph. 609.

(3) 3 Steph. 609; Wharton's L. Lex.

(4) Form of—see Tr. and Coote 310, 312.

(5) Rawson's L. Lex.

the instrument so propounded is the last will of a free and capable testator. But where the party opposing the will admits the due execution, but alleges that the will was obtained by undue influence, fraud, or the like, or that the will was revoked, then the burden of proof is thrown upon such party. [*Barry v. Butlin*, 1 Curt. 638—*per* Parke B.; 2 Moo. P. C. 480; see *Lachko Bibi v. Gopi Narain*, I. L. R. 23 A. 472; *Sukh Dei v. Kedar Nath*, *Ibid*, 405; 5 C. W. N. 895, P. C.] (1). The burden may also be thrown upon such party in cases where there had already been full inquiry in the previous proceedings [*Komal Lochun Dutt v. Nilratton Mundle*, 4 Cal. 360].

§ 17. **Review.**—It seems, no review of judgment is allowable for the purpose of revoking a grant. In *In re Pitamber Girdhar* (I. L. R. 5 B., 638), however, Sargent J. was of opinion that, as the rules of testamentary proceedings are to be consistent with those of the Code of Civil Procedure, it might be right, under proper circumstances, to allow review in testamentary matters.

§ 18. **Effect of revocation.**—Grants are either void or voidable (2); and the effect of revocation depends to a great extent upon whether a grant is

the duty of the Court to try that question first of all throwing the *onus* upon the petitioner [*Mayho v. Williams*, 2 N. W. P. H. C. R. 258]? If both these questions or either of them is answered in the affirmative, it will appear that the making out of a *prima facie* case includes the determination of such questions or question, and the *onus* invariably lies upon the petitioner.

Secondly, the *factum of the will*—Thus after these preliminaries have been determined, if the Court finds a *prima facie* case has been established and the petitioner has *locus standi*, it will then be its duty to call upon the other party to prove the will *de novo* in a solemn form. And now the *onus* will lie upon the party propounding the will and it will be his duty to satisfy the Court as to its genuineness in the presence of the petitioner praying revocation.

There may be cases in which the application is merely to have the will proved in solemn form. In such cases, the *onus* must invariably be placed on the party propounding the will, no matter whether the previous grant was upon full inquiry or not [*Barry v. Butlin*, *supra*; *Hoffman v. Norris*, 2 Phill. 231; *Merryweather v. Turner*, 3 Curt. 802, 817; *Sukh Dei v. Kedar Nath*, *supra*; *Elokeshi Dassi v. Hurry Prasad Soor*, 7 C. W. N. 450; but see *Prem Chand Das v. Surendra Nath Shaha*, *supra*]. But it is doubtful whether this ruling which is based on the practice in England is applicable in its entirety in this country, especially in the Muffasil Courts. In England, probate in common form is granted without any citation upon parties. But here under sec. 69 (P) *infra*, no probate can be granted without citing the interested parties; the result being that, in every case under this section it becomes necessary for the petitioner to satisfy the Court as to the reason which prevented him from appearing and demanding a proof in solemn form at the first hearing.

It will thus appear that, generally speaking, in this country, it is not possible always to avoid preliminary inquiries. As to how such inquiries are to be conducted and on what materials there is absolutely nothing in the Act. It will depend chiefly upon the nature of the petitioner's case, and the nature of the opposition, if any. But see *infra*, sec. 55 (P).

So far, therefore, as the *onus* is concerned, the result of the authorities seems to be that, broadly speaking, in all preliminary inquiries the *onus* lies on the petitioner; and on the merits, that is, in inquiries into the genuineness of the will, it is invariably thrown on the propounder.

In cases of grants where there is no will, which also come within the operation of this section, so far as preliminaries are concerned, the rule as to *onus* must be the same as in cases of probate. On the merits also, it is submitted the same rule will prevail. But where both parties claim preferential title against each other based upon facts requiring proof, it seems, the *onus* will lie upon both of them, as in an ordinary regular suit.

By "propounding" a will is meant presenting it to the Court for probate or proof (3).

void or voidable only. Generally speaking, the effect of revocation is to revive the original proceedings [*Brindaban Chandra Shaha v. Sureswar Shaha Pramanick*, 10 C. L. J. 263].

Where the grant is in derogation of the right of an executor, as where administration is granted on the concealment of a will, the grant is void *ab initio*. In such cases, all the acts done by the administrator as such between the grant and its revocation, are of no validity [*Ellis v. Ellis* (1905) 1 Ch. 613; *Debendra Nath Datt v. Administrator General Bengal*, L. R. 35 I. A. 109; I. L. R. 35 C., 955; 12 C. W. N. 802; 8 C. L. J. 94; 10 Bom. L. R. 648; 18 M. L. J. 367; 3 C. L. J. 422; 10 C. W. N. 673; 33 C., 713]. But where the grant is obtained by suppressing a will containing no appointment of executors, it is not void *ab initio*, and the sale of a property of the deceased by such grantee to a purchaser who is ignorant of such suppression, is valid, even where the grant is revoked after the sale [*Gopal Dass Agarwallah v. Budree Das Sureka*, 10 C. W. N. 662; I. L. R. 33 C., 657, following *Boxall v. Boxall*, (1884) 27 Ch. D. 220]. Similarly, where letters of administration were procured fraudulently representing that the deceased had left no will and by producing a forged power of attorney from a fictitious person whom the applicant falsely represented to be the sole next-of-kin of the deceased, it was held that the grant was only void from the date of the order of revocation and not *ab initio* [*Craster v. Thomas* (1909) 2 Ch. 348].

It appears, however, from certain cases that, where the administrator acts voluntarily, *i.e.*, does what he is not compellable to do according to law (paying funeral expenses, debts, legacies, &c), the grant is simply void and no title is thereby conferred on a vendee or mortgagee from him [See *Peckham's case* (1488) and *Graysbrook v. Fox* (1562), and *Ellis v. Ellis*, *supra*; see also *Hewson v. Shelley* (1913) 2 Ch. 384]. In the case last cited, the grant was obtained *bonâ fide* in ignorance of a will appointing executors, and it was held, reviewing the authorities, that such grant was void *ab initio* (1). But see sec. 84 (P), *infra*.

Where the grant is made in derogation of the right of the next-of-kin or residuary legatee, as for instance, where it is made without citing the necessary parties; that is, where the administration is to be revoked because it should be granted to another, the grant is voidable; and all the lawful acts of the first grantee stand good (2).

As to the effect of payments made to executors or administrators before revocation, see sec. 84 (P), *post*.

The Court will not revoke a grant limited to attending proceedings in a Court of justice, before the suit is ended (3).

§ 19. How probate may be impeached in an ordinary Civil Court.—See section 44, Act I of 1872 (Indian Evidence Act) and the observations of White J. in *In re Bhabo Sundery Dabee* [I. L. R. 6 C., 460, at p. 462, citing *Barnesly v. Powell*, 1 Ves Sen. 119, 284], and of Markby J. in *Komolothun Dutt v. Nilruttun Mundle* [I. L. R. 4 C., 360]. There is a distinction between cases of fraud upon testator and those of fraud upon next-of-kin or upon Court.

Where the plaintiff having obtained letters of administration to the estate of a deceased landlord, sued the defendant for rent and the latter objected that

(1) See Wms. 465, 10th Ed.; Inghen. 141; 14 L. of Eng. 216—217.

(2) *Ibid*.

(3) Tr. and Coote 293.

The letters of administration had been obtained by misrepresentation as to the relationship of the plaintiff with the deceased, it was held, that such plea was not sufficient to entitle the defendant to go into evidence for the purpose of proving that the letters were invalid in law, supposing such letters could be regarded as an order within section 44 of the Indian Evidence Act (1 of 1872). Thus, until the letters were revoked the plaintiff had a good title [*Ambica Churn Das v. Kala Chandra Das*, 10 C. W. N. 422 ; *Rajib Panda v. Lakhan Sendh Mohapatra*, I. L. R. 27 C., 11, distinguished].

§ 20. "Explanation."—The explanation, as already seen (§ 3, *supra*), is exhaustive and not illustrative merely [*Bal Gangadhar Tilak v. Sakwarbai*, I. L. R. 26 B., 792, 798 ; *Annada Prosad Chatterjee v. Kali Krishna Chatterjee*, I. L. R. 24 C., 95].

Expl. 4th—"Useless and inoperative."—These words imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it ; as for example, the discovery of a later will or codicil, or that the will was forged ; thus what would not have furnished a ground for refusing probate can form no ground for revoking it. Where a testator, after appointing five executors, provided that they should manage the moveable and immoveable estate on behalf of his minor son until he attains majority ; and after the death of that son the testator's widow applied for revocation of the probate on the ground that, on the death of her minor son the property having vested in her as his heir, the grant of probate became "useless and inoperative through circumstances" ; it was held that this was not a "just cause" and formed no ground for revocation. In delivering the judgment of the Court, Mr. Justice Crowe said : "In the view we take of the meaning to be attached to clause 4 of the explanation to section 50, it is immaterial whether there was anything for the will to operate upon or not ; for we regard the grant of probate as decisive only of the genuineness of the will propounded, and the right of the executors thereby appointed to represent the estate of the testator. It in no respect decides any question as to the disposing power of the testator or as to the existence of any disposable property." [*Bal Gangadhar Tilak v. Sakwarbai*, *supra* ; see *In the goods of Patterson*, 2 C. W. N. cccix]. See sec. 69 (P).

On the same principle, as held in *Arunmoyi Dasi v. Mohendra Nath Wadadar* [(1893) 20 C., 888], the grant of probate is no bar to a suit for the establishment of the title of any person prejudiced thereby, or for the construction of the will ; so that the decree in any such suit supersedes the probate and it becomes inoperative (revoked) without any proceeding under this section. In other words, the grant becomes useless and inoperative through circumstances [*Rajendra Chandra Mitra v. Manick Lal Ghatak* (1911) 8 A. L. J. 1063 ; See *Jagannath Prosad Gupta v. Ranjit Singh* (1897) 25 C., 354].

Mere disagreement between administrators (as, between adopted son and his adoptive mother) is not a "just cause" under this explanation [*Gourchandra Das v. Sarat Sundari Dasi* (1912) 40 C. 50 ; 16 C. W. N. 880 ; *Annada Prosad Chatterjee v. Krishna Chatterjee* and *Bal Gangadhar Tilak v. Sakwarbai*, *supra*, followed].

Expl. 5th.—Mere omission to submit accounts, is not a 'just cause' [see *Bal Gangadhar Tilak v. Sakwarbai*, *supra* ; *Hill v. Bird*, Story, 102]. The Court must be satisfied that it was wilful and without reasonable cause [*Primchand Das v. Surendra Nath Shaha*, 9 C. W. N. 190 ; *Gokuldas*

Parbhudas v. Purshottam Vishnudas, 4 Bom. L. R. 979]. Nor is it sufficient that the account or inventory should be incorrect; it must be untrue in material respects [*Gokuldas Parbhudas v. Purshottam Vishnudas*, *supra*]. See *post* 98 (P), § 7.

§ 21. Grantee's death, effect of on revocation.—Death of grantee does not preclude an application for revocation being entertained. But if no object is to be gained by revocation the application may be disallowed [*Willis v. Earl Beauchamp*, L. R. 11 P. D. 59]. The widow of a testator, who was the sole executrix and legatee, after having taken out probate in common form (without any citation) died, leaving her husband's brother's son N., as the next reversioner; but her heir and representative B. B. D., took possession of the testator's property. On an application being made by N. for the revocation of the grant and for an order that the will may be proved in solemn form by B. B. D. in his presence, it was held that the application was properly made. B. B. D., however, declining to prove the will as prayed for, the grant was revoked [*Re Gopimohan Bysack and Re Nemai Chand Bysack*, 5 C. L. J. 560].

§ 22. Miscellaneous.—The revocation of the first grant, and the substitution of the new, ought to be made at the same time (1). A revoked grant in the hands of an unscrupulous person may prove injurious to the estate of the deceased. Accordingly, the revoked probate or letters are required to be forthwith delivered up to the Court. [See sec. 157 (P), *post*].

Cause of revocation being removed, fresh application may be entertained for the same grant.

The cause of revocation being removed, it is within the competency of the judge to entertain fresh application for the same grant, after letters of administration had once before been revoked [*Brij Lal v. Secretary of State*, 1897, 1. L. R. 20 A. 109].

Parties in a revocation suit. In a suit for revocation, not only the executor or administrator, but other persons interested in supporting the will, such as a purchaser from the executor, may appear and oppose the application [*Kashi Chundra Deb v. Gopi Krishna Deb*, 1. L. R. 19 C., 48].

Any judgment or decree passed against the former grantee is binding on the new grantee [*Bai Meherbai v. Magan Chand*, 1. L. R. 29 B., 96; 6 Bom. L. R. 853].

§ 23. Whether revocation proceedings are suits.—See *post*, sec. 83 (P).

(1) Tr. and Coote 202; Coote 191.

CHAPTER V.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.*

The rules contained in this Chapter, have for the most part, been taken from Coote,s "Practice of the Court of Probate," and from the Court of Probate Act 1857 (20 and 21 Vict. C. 77).

167. ^{51 (P)}_{235 (s)}.—The District Judge shall have jurisdiction in granting and revoking, probates and letters of administration in all cases (a) within his district.

Jurisdiction of District Judge in granting and revoking probates, &c.

NOTES AND COMMENTARIES.

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| § 1. <i>Object of the section.</i> | § 3. <i>Functions of the Court of Probate.</i> |
| § 2. <i>Jurisdiction.</i> | § 4. <i>Will in Certificate Court.</i> |

§ 1. **Object of the section.**—"As property of every kind is to devolve in the same channel, we have deemed it necessary to facilitate the constitution of a general representative of the deceased, with unlimited power. We have therefore provided for the probate of wills and grant of letters of administration by the judge of every Zillah and City Court, and by such of the judicial officers subordinate to him as he shall designate for that purpose" (1).

* In this connection Part III of Act III of 1913 (Administrator General's Act) may be consulted with advantage.

(a) "**In all cases.**"—These words, as referring to *letters of administration*, include cases of testacy as well as of intestacy. So that, "letters of administration" are used as comprehending all letters of administration, whether with will or without will annexed, and whether general, special or limited. This is clear from the definition of the word "Administration" given in the English Court of Probate Act, 1857 (Stat. 20 and 21 Vict. c. 77) on the basis of which the rules under this chapter have been enacted. That definition is to the following effect:—"Administration" shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special or limited purposes." See sec. 2, 20 and 21 Vict. c. 77.

The words "in all cases" evidently refer to letters of *administration* only, for, "probate can be granted only to an executor appointed by the will" as laid down in section 6 (P), *supra*.

(1). From the report of the Commissioners appointed to draw up a body of substantive law for India. (Gazette of India, extraordinary, dated 1st July 1864, p. 53).

§ 2. Jurisdiction (1).—In the Maffasal the District judges are the sole Courts of Probate, and they exercise an exclusive jurisdiction under this section, similar to what used to be exercised by the Ecclesiastical Courts in England in testamentary and intestate matters.—Here *jurisdiction* means legal authority.

The High Courts have concurrent jurisdiction with the District judge in the exercise of all the powers conferred by this section upon the District judge. See sec. 87 (P), *post*.

Before the passing of Act V of 1881 the powers of District Courts respecting grants of probate or letters of administration were confined to cases of wills made on or after the 1st day of September 1870 [*Luchmun Bharti v. Dukharan Bharti*, 6 C. L. R. 138]; but since the passing of that Act, the District judges have jurisdiction to grant probate or letters of administration in respect of wills of Hindus executed before that date [*Krishna Kinker Roy v. Rai Mohon Roy*, I. L. R. 14 C., 37; *Krishna Kinker Roy v. Pancharam Mundal*, I. L. R. 17 C., 272].

In Assam the jurisdiction in granting probate and letters of administration under this section is vested in the Judicial Commissioner. [*Thakoor Kristo - Surma Adhicaree v. Basoodeb Goshamce*, 12 W. R. 424].

“A Court does not very readily attribute to itself power and authority merely by implication from the words of a Statute. It must be only where the implication cannot be avoided that it would feel itself justified in doing so” [Mr. Justice Phear in *In bonis Duncan*, 1 B. L. R. A. J. 3]. Thus where a surety under an administration bond, under section 78 (P), *post*, who is powerless to stop maladministration by instituting administration suit, applies to be discharged of his suretyship on the ground of such maladministration by the holder of letters of administration, the Court has jurisdiction to entertain the application and grant such relief as he may deem proper. In such cases the giving of an administration bond with sureties being a “part and parcel of the procedure connected with the granting of letters of administration,” the jurisdiction to discharge a surety, the Act being silent on the point, must be held to be included (by implication) within the jurisdiction to grant and revoke probates and letters of administration [*Raj Narain Mookerjee v. Ful Kumari Debi*, 6 C. W. N. 7]. See *infra*, sec. 78 (P).

Where on an application to the District judge probate is refused, and the will is held by the High Court, on appeal, to be proved, it is the duty of the District Judge to issue the probate [*Bayahai v. Sarasvatibai*, I. L. R. 17 B., 686].

The Recorder's Court has the same powers in respect to the grant of probates and letters of administration to the estates of the natives, as the High Courts before and after the passing of the Indian Succession Act [see *In re Kokya Daine*, 10 W. R. 417; 2 B. L. R. 79; *In re Fackerooddeen Adamsaw*, 11 W. R. 413].

§ 3. Functions of the Court of Probate.—The functions of the Court of Probate are:—(a) To determine what testamentary papers are entitled, in whole or in part, to be admitted to probate, and what person or persons are entitled to be constituted the legal representative of the deceased; (b)

(1) See *supra* sec. 50 (P), § 2, and *infra* sec. 56 (P), § 2.

when the deceased has died testate, to decide which of his testamentary papers constitute his last will, and whether he has appointed an executor, and who that executor is; and (c) when the deceased has died testate, but has omitted to appoint an executor, or the executor appointed by him has declined to act, or if he has died intestate, to determine who is to administer his estate. The Court of Probate may construe a will making grant within certain limits, and may also determine the meaning of any reference made by the testator in his will or codicil, and whether any and what papers found at the testator's death, are thereby referred to (1). See sec. 53 (P), *infra*.

It is not the function of the Court to determine as an abstract question who is the proper representative of the deceased [*Re Tucker* (1864) 3 Sw. & Tr. 585, at 586].

§ 4. **Will in Certificate Court.**—Will may be proved in a Certificate Court; but such proving shall not bind the Probate Court. Thus in a Court of Probate, one may question the genuineness of a will proved in a Certificate Court [see *Chinnasami v. Harihara Badra*, I. L. R. 16 M., 380]. See *post* sec. 55 (P), § 4.

168. **52 (P).**
235 A (s)—The High Court may, from time to time, appoint such Judicial officers within any District as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may from time to time prescribe :

Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called "District Delegates."

In England, "by Statute 25 Hen. VIII. c. 19, an appeal was given from the Archbishop to certain commissioners. These commissioners were commonly called Delegates (according to the language of the Civil and Canon Law), on account of the special commission or delegation they received from the king" (2).

This section authorises the District Judge by implication to transfer a case to the District Delegate for inquiry and report [*Kunja Lal Chowdhuri v. Kailash Chandra Chowdhuri* (1910) 14 C. W. N. 1068].

(1) Code 77.

(2) Wills 578-79.

169. 58 (P).
236 (s).—The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding in his Court.

District Judge's powers as to grant of probate and administration.

NOTES AND COMMENTARIES.

- § 1. *The section.* (c) *Power to grant Review.*
 § 2. *"Powers and Authority."* (d) *Power to construe will.*
 (a) *Power to appoint Receiver.* (e) *Power to transfer.*
 (b) *Power to allow suits in forma pauperis.*

§ 1. **The section.**—This section may be compared with section 25 of the Court of Probate Act, 1857 (20 and 21 Vict. C. 77), as, by such comparison, in the words of Sir Whitley Stokes, "Light may possibly be thrown on this somewhat obscure section" (1). That section runs as follows:—

"The Court of Probate shall have the like powers, jurisdiction and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting or refusing to produce deeds, evidences or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be enquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court"

This section confers on the District Judge all the powers and authority that are vested in him in relation to any ordinary civil suit or proceeding; and section 55 (P) *post*, prescribes the procedure which is to be followed in the exercise of such powers and authority, subject to the exceptions therein mentioned. See sections 55 (P), 69 (P) and 83 (P), *post*.

§ 2. "Powers and authority."—

(a) **Power to appoint Receiver.**—The Court of Probate has power to appoint a receiver under Or. XL. Civil Procedure Code of 1908. [*Yeshwant Bhagwant Phatarparker v. Shanker Ram Chandra Phatarparker*, I. L. R. 17 B., 388. See *Hafizabai v. Kazi Abdul Karim*, I. L. R. 19 B., 83].

Section 239 of the Indian Succession Act expressly authorises the appointment of a receiver, though the word "receiver" is not used. That section has

(1) Stokes. 157.

been omitted in this Act. In *Yeshtwant Bhagwant v. Shanker Ram Chandra* (*supra*), in explaining the reason of this omission, Sargent J. said: "that the framers of the Act (V of 1881) having provided in section 55 that proceedings in relation to the granting of probate and letters of administration should be regulated by the Civil Procedure Code, and knowing the provisions of that Code as to receivers * * * have left the appointment of a receiver to be regulated by the provisions of that Code."

(b) **Power to allow suits in forma pauperis.**—Where an executor is not in possession of the property of his testator and cannot get possession of it, and where he has not himself the means of paying the necessary fees, he may be allowed to petition for probate *in forma pauperis*. [*Dawnbai, in the matter of Hazi Khan Hubil Khan*, I. L. R. 18 B., 237]. So one may apply for revocation *in forma pauperis* [*In the goods of Guru Charan Cundoo*, 6 C. W. N. cxlvii].

(c) **Power to grant Review.**—See section 50 (P), § 17, *ante*.

(d) **Power to construe will.**—The Court of Probate may construe a will incidentally for the purpose of determining whether any particular person is entitled to any grant. [See *Arunmoyi Dasi v. Mohendra Nath*, I. L. R. 20 C., 888]. See *ante* sec. 7 (P), § 9 and 51 (P) § 3.

(e) **Power to transfer.**—In Bengal and the N. W. Provinces, a District judge has power to transfer a contentious or non-contentious case under this Act to a subordinate judge for trial, under section 23, sub-sec. 2 cl. d of Act XII of 1887 [*Kunja Behary Goswami v. Hem Chandra Lahiri*, I. L. R. 25 C., 340].

170. **54 (P)**
237 (s). —The District Judge may order any person to produce and bring into Court any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct him to attend for the purpose of being examined respecting the same,

District Judge may order person to produce testamentary papers.

and he shall be bound to answer such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of

default, in not attending or in not answering such questions or in not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit, and had made such default,

and the costs of the proceeding shall be in the discretion of the Judge.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 3. *Miscellaneous.*

§ 2. *Will deposited under the Registration Act.*

§ 1. The section.—This section is nearly a reproduction of section 26 of the Court of Probate Act, 1857 (20 and 21, Vict. C. 77), which as amended by section 23 of the Act of 1858, enacts that.—

This section as amended by section 23 of the Court of Probate Act, 1858, enacts that, "It shall be lawful for a Registrar of the Principal Registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpoena requiring any person to produce and bring into the Principal or any District Registry, or otherwise, as in the said subpoena may be directed, any paper or writing being or purporting to be testamentary which may be shown to be in the possession, within the power or under the control of such person; and such person upon being duly served with the said subpoena, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he has been a party to a suit in the said Court, and had been ordered by the Judge of the Court of Probate to produce and bring in such paper or writing."

§ 2. Will deposited under the Registration Act.—Section 46 of the Indian Registration Act (XVI of 1908) saves "the power of any Court by order to compel the production of any will." See *infra*, sec. 81 (P). F. n.

§ 3. Miscellaneous.—An exemplification (1) of a will is an instrument falling within this section, and it may be ordered to be produced and brought in [*In re Newton*, 8 B. L. R. App. 76].

In England, it has been held that, the lien of an attorney or solicitor does not extend to the original will executed by his client; and that, he cannot refuse the production of it. [*George v George*, 18 Ves. 294] (2).

(1) See sec. 5 (P), *ante*.

(2) Wms. 317.

This section may be compared and read with sections 136, 164, 165, 171 and 650 of the Code of Civil Procedure (Act XIV of 1882).* As regards punishment, see Chapter X of the Indian Penal Code (Act XLV of 1860).

171. **55 (P)**
238 (S).—The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration, shall, except as hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit by the Code of Civil Procedure.

Proceedings of District Judge's Court in relation to probate and administration.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 5. <i>The Limitation Act.</i> |
| § 2. <i>"Except as hereinafter otherwise provided."</i> | § 6. <i>Reference to arbitration.</i> |
| § 3. <i>Application of C. P. Code in suits under this Act.</i> | § 7. <i>Applicability of English precedents in procedure.</i> |
| § 4. <i>Res judicata</i> | § 8. <i>"Discovery."</i> |
| | § 9. <i>Stay of Execution.</i> |
| | § 10. <i>Estoppel.</i> |

§ 1. **The section.**—This section must be read with sections 53 (P) *ante*, and 69 (P) and 83 (P) *post*. It provides, generally, very nearly in the language of section 23 of Stat. 36 and 37 Vict c. 66 (Supreme Court of Judicature Act, 1873), that the jurisdiction conferred on District Judges is to be exercised, "so far as regards procedure and practice," in the manner provided by this Act, "or by such rules and orders of Court as may be made pursuant to it," and that where no special provision is contained in this Act or in any such rules or orders of Court with reference thereto, "it is to be exercised as nearly as may be in the same manner as the same might have been exercised" by the Maffassal District Courts under the Code of Civil Procedure in the trial of ordinary original civil suits.

§ 2. **"Except as hereinafter otherwise provided."**—These exceptions are referable chiefly to the following :—

- (1) Local jurisdiction of the Court [sec. 56 (P), *post*].
- (2) Transferring a case to any other District [sec. 57 (P) *post*].

* These sections correspond to Or. XI. r. 21; Or. XVI. rr. 6 and 7; Or. XVI. r. 14; and sec. 29, respectively of the Code of 1908.

(3) Subscription and verification of petitions and statements [secs. 66 (P) and 67 (P), *post*].

(4) Publication of citation [sec. 69 (P), *post*].

(5) Production of papers and instruments [sec. 54 (P), *ante*].

§ 3. **Application of C. P. Code in suits under this Act.**—Applications for probate or letters of administration are divided into two classes according as there is contention or no contention. It has been held that, in contentious cases only the procedure is to be regulated by the Code of Civil Procedure [see *Pakiam Pillai v Innasi Fernand*, I. L. R. 19 M. 458 ; *Chotolal Chunilal v. Bai Kabubai*, I. L. R. 22 B. 261 ; also *In the matter of the petition of Dintarini Dabi*, I. L. R. 8 C., 880, at 882]. But it does not follow from this that, in non-contentious cases that Code is not applicable. For, “by virtue of section 647 (C. P. Code of 1882), corresponding to sec. 141, Act. V of 1908, the same Code is to be followed, as far as it can be made applicable, in all proceedings in all Courts of Civil jurisdiction other than suits and appeals ; and non-contentious proceedings for grant of probate or letters of administration are miscellaneous proceedings other than suits [*Ramgopal Das v. Radhakrishna Das*, 10 C. W. N. xcv]. The Code must, therefore, so far as it can be made applicable, govern non-contentious cases also” [Field, J., in *In re Dintarini Dabi*, *supra*]. In the High Courts, so long as a petition for probate or letters of administration is non-contentious, it is to be dealt with by the Registrar [*Chotolal Chunilal v. Bai Kabubai*, *supra*]. As to the application of the Civil Procedure Code, generally, see the observations of Sargent, J., in *Yeshwant Bhagwant v. Shanker Ram Chandra* [I. L. R. 17 B., 388]. See Secs. 69 (P) and 83 (P), *post*.

Section 32 of the Code of Civil Procedure of 1882, corresponding to Or. I. rules 8, 10 and 11 of the Code of 1908, is applicable to suits under this Act. In *Abhiram Dass v. Gopal Dass* [I. L. R. 17 C., 48] the order of the District judge admitting the *Caveator* as a party was held to be appealable under section 588 of the old Code, corresponding to section 104, and Or. 43 r. 1 (2) of that of 1908, thereby deciding that the order appealed against was one under section 32, being the same in effect as if he had been made a defendant under that section [see *Khettramoni Dasi v. Shyama Churn Kundu*, I. L. R. 21 C., 539]. So are sections 53 (Or. V r. 17) and 108. (Or. IX, r. 13) [see *Dintarini Dabi v. Daibo Chandra Roy*, I. L. R. 8 C., 880 ; *Khettramoni Dasi v. Shyama Churn Kundu*, *supra*] and also sections 30 (Or. I, r. 8) and 438 (Or. XXXI, r. 2) [see *Gereebala Debee v. Chunder Kant Mukherjee*, I. L. R. 11 C., 213 and *Hafiza Bai v. Kazi Abdul Karim*, I. L. R. 19 B., 83]. Similarly, the rules contained in Chapter XXXI of the C. P. Code of 1882, corresponding to Or. XXXII, of Act V of 1908, as to suits by and against minors and persons of unsound mind [see *In the goods of Amrita Lal Mullick*, I. L. R. 27 C., 350], and the powers of the High Court under section 622 of the Code of 1882, corresponding to section 115 of Act V, 1908 [*Khettramoni Dasi v. Shyama Churn Kundu*, *supra*] apply to proceedings under this Act. See *Gerindra Kumar Das Gupta v. Rajeswari Ray*, I. L. R. 27 C., 5 ; *Annaji Dattatraya v. Chandra Bai*, I. L. R. 17 B., 503. And also secs. 86 (P) and 87 (P), *post*.

Section 177 C. P. Code of 1882 (corresponding to Or. 16, r. 20) does not apply [*Raoji Ranchod Naik v. Vishnu Ranchod Naik*, I. L. R. 9 B., 241,

See *post* 69 (P) § 5 (y)]. Nor does section 103 (Code of 1882) corresponding to Or. IX, r 9 (Code of 1908) apply. For, if probate has been refused, not on the merits, but merely by reason of the insufficiency of some matter of form or procedure, there is no adjudication that the instrument is not entitled to probate, and, therefore, it may be again propounded [*Ramani Debi v. Kumud Bandhu Mookerjee* (1910) 14 C. W. N. 924; 12 C. L. J. 185; *Lilly v. Tobbein* (1890), 103 Mo. 477, followed]. Moreover, an executor presenting an application for probate cannot be regarded as a plaintiff suing in respect of a cause of action within the meaning of the said section 103 of the old Code [*Ibid*].

§ 4. Res judicata.—The judgment of a Court of Probate granting probate being a judgement *in rem*, judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar to an investigation in the Probate Court as to the *factum* of the will propounded in that Court. So the only judgment that can be put forward in a Court of Probate in support of the plea of *res judicata* is a judgment of a competent Court of Probate (a) [*Chinnasami v. Harihara Bhadra*, I. L. R. 16 M., 380].

Refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator. "The conclusiveness of probate rests upon the declared will of the Legislature as expressed in sections 12 and 59 of the Act. There is no section which declares that any corresponding

(a) But the judgment of a competent Court of Probate passed in the previous proceedings, showing what the Judge understood to have been the questions for decision in those proceedings is not enough to support a plea of *res judicata* in a subsequent suit in another Court of a different jurisdiction; for, such Court cannot give effect to the plea unless it can say for itself that the matters in issue in the suit under trial were in issue in the previous proceedings. In such cases, therefore, it is necessary that the whole previous proceedings should be placed before the Court in the subsequent suit in order that effect may be given to the plea [*Kuratulain Bahadur v. Peara Saheb*, I. L. R. 33 C. 116; L. R. 32 I. A. 244; 15 M. L. J. 336; 2 A. L. J. 758; 1 C. L. J. 594; 7 Bom. L. R. 876]. See *ante*, sec. 12 (P), § 3(a) p. 614.

Following this principle effect was given to the plea of *res judicata* in a subsequent suit between the parties for declaration that the plaintiff (who was one of the caveators in in the probate proceedings) was the next reversioner to the estate of the testator [*Ramnandan Pershad v. Sheoparan Singh* (1910) 11 C. L. J. 623]. But see *Chintaman v. Ram Chandra* [(1910) 12 Bom. L. R. 694] where in a similar case, Mr. Justice Chandavarkar overruled the plea of *res judicata* on the ground that the Court of Probate is not competent to enter into the title of the property. See also *Lalitmohan Das v. Radharaman Saha* [(1911) 15 C. W. N. 1021] in which a similar view was expressed by Mr. Justice Mookerjee. According to that learned Judge "the jurisdiction which a Court of Probate exercises * * * is special jurisdiction distinct from ordinary jurisdiction of the Court" and that such Court is not competent to decide any question of title, its competency extending only to the determination of questions relating to representation and distribution or administration, especially in a case under section 23 of the Probate and Administration Act. It was further held that the cases of *Ramnandan v. Sheoparam Singh* (*supra*) and *Kuratulain Bahadur v. Peara Saheb* (*supra*) did not lay down any general proposition of law to the effect that every matter decided in proceedings for grant of probate or letters of administration operates as *res judicata* in a subsequent civil suit between the parties

The weight of authority seems to be in favour of the view that the decision of a Probate Court as regards title to any property, does not operate as *res judicata*. See judgment of Caspersz, J., in *Lalitmohan Das v. Radharaman Saha*, *supra*, at p. 1028.

But the decision as to whether the words of a clause form part of the will, is conclusive and operates as *res judicata* [*Brendon v. Shrimanta Sundarabai* (1913) 23 I. Cas 221].

result in an opposite sense shall flow from the refusal to grant it." (a) [*Ganesh Jagannath Deb v. Ram Chandra Ganesh Deb*, I. L. R. 21 B., 563, at 566,—*per* Farran. C. J.]. The executor is not, accordingly, precluded from making a fresh application for probate whenever he may be in a position to support the will with more complete proof [*Ganesh Jagannath Deb v. Ram Chandra Ganesh Deb*, *supra*]; nor is he precluded where the application is dismissed for default under Or. IX, r. 9 of the Code of Civil Procedure [*Ramani Debi v. Kumud Bandhu Mukerjee*, *supra*].

§ 5. **The Limitation Act.**—The Limitation Act does not apply to applications for probate or letters of administration [*In re Ishan Chandra Roy*, I. L. R. 6 C., 707; *Empress v. Ajudhia Singh*, I. L. R. 10 A, 350; *Kasi Chandra Deb v. Gopi Krshna Deb*, I. L. R. 19 C., 48; *Bai Manekbai v. Manekji Kavasji*, I. L. R. 7 B., 213; *Janaki v. Kesavalu*, I. L. R. 8 M., 207; *Thiruvengada Naickea v. Mahomed Salia Sahib*, 9 M. L. J. 382]. Accordingly, where the first application for probate was dismissed for default and the second application was filed 30 days after that order, it was held that this application was not out of time under the provisions of section 99 of the C. P. Code of 1882 (Or. IX, r. 4 of 1908). Mr. Justice Muthusami Ayar said: "The reason for the exemption of applications for probate from the operation of the Limitation Act probably is that the application for probate is in the nature of an application for permission to perform a duty created by a will or for recognition as a testamentary trustee, and the right to apply continues so long as the object of the trust exists or any part of the trust if really created remains to be executed" [*Gnanamuthu Upadisi v. Vanakoil Pillai Nadan*, I. L. R. 17 M., 379, at 381].

§ 6. **Reference to arbitration.**—An executor against whose application for probate a *caveat* has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased. Nor, it seems, can the Court itself, refer the *factum* of the will to arbitration under section 508 of the old Code of Civil Procedure, [*Ghelliabai v. Nandubai*, I. L. R. 21 B., 335; see *Hem Chunder Singh v. Sarat Chandra Singh*, 3 C. W. N. lxxviii].

§ 7. **Applicability of English cases in procedure.**—A special procedure having been laid down in this Act, the English cases, it seems, do not apply in matters of procedure [*In re Nesbitt and In re Briant*, 4 B. L. R. App. 49]. See *ante* sec. 25 (P), the observations of Maclean, C. J., in *Keder Nath Mitter v. Sorojini Dassi* (3 C. W. N. 617).

§ 8. **"Discovery."**—In consequence of the peculiar nature of the inquiry in probate cases, the Court exercises a wider latitude in ordering discovery in these suits than is exercised in other actions.

(a) But this is opposed to the view expressed by the Madras High Court in *Chinnasami v. Harihara Bhadra*, *supra*. In that case Muthusami Ayer and Handley, JJ., held, that the judgment of a Court of Probate refusing probate is as much a judgment *in rem*, as one granting probate. Section 41 of the Indian Evidence Act supports this view. And it seems probable from the guarded language of Farran, C. J., as well as from the facts of the case, that, in *Ganesh Jagannath Deb v. Ramchandra*, *supra*, their Lordships of the Bombay High Court did not intend to lay down any rule of general application by holding that, refusal to grant probate was not conclusive.

But it has been held by the Allahabad High Court that refusing an application for letters of administration with copy of will, is a decree and is thus appealable [(1913) *Mountstephens v. Orme*, 22 Ind. cas. 98].

The practice of the Court, therefore, is to order discovery of all facts and documents which might turn out to have any possible bearing on the issues raised (1).

§ 9. **Stay of execution.**—The execution of a decree directing the issue of a grant of probate, may be stayed under section 545 of the Code of Civil Procedure (corresponding to Or. LXI, r. 5) [*Brij Coomaree v. Ramrick Dass*, 5 C. W. N. 789].

§ 10. **Estoppel.**—See *post*, sec. 69 (P).

172. **56 (P)**
240 (S).—Probate of the will or letters of adminis-

When probate or
administration may
be granted by District
Judge.

tration to the estate of a deceased person may be granted by the District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter mentioned, of the person applying for the same that the testator or intestate, as the case may be, had at the time of his decease a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 3. "*Fixed place of abode.*"

§ 2. *What gives jurisdiction to the Judge.*

§ 4. "*Any property.*"

§ 1. **The section.**—This section is modelled upon section 46 of the English Court of Probate Act, 1857. That section enacts as follows :—

"Probate of a will or letters of administration may, upon application for that purpose to the District Registry, be granted in common form by the District Registrar in the name of the Court of Probate and under the seal appointed to be used in such District Registry, if it shall appear by affidavit of the person or some one of the persons applying for the same, that the testator or intestate, as the case may be, at the time of his death, had a fixed place of abode within the District in which the application is made, such place of abode being stated in the affidavit, and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly."

(1) Tr. & Coote 469.

§ 2. What gives jurisdiction to the Judge (a).—A fixed place of abode or any property of the deceased, within the local jurisdiction of the judge, is all that is required to give him jurisdiction for the purpose of making a grant under this Act. [See *Kmona Sundary Dasi v. Hurro Lal Shaha*, I. L. R. 8 C., 570; also *Fardunji v. Navajibai*, I. L. R. 17 B., 689]. See *infra*, § 4.

§ 3. "Fixed place of abode."—These words are borrowed from the English Court of Probate Act, 1857, section 46 (see *supra*).

The word "abode" means place of residence. In law it is used in different senses, to denote the place of a man's residence or business, temporary or permanent (1). It is often used as synonymous with the word "Dwelling," which is the place where a man lives with his wife and family. It may be said to be constituted by an actual occupancy coupled with an intention to give a character of permanency to such occupancy.

The words "dwelling" and "residence," which are synonymous with "abode," are sometimes used as equivalent to domicile or home. [See *Lamb v. Smith*, 15 L. J., Exch. 207, cited in *Gopal Chandra Sirkar v. Kurnodhar Moochee*, 7 W. R. 349 and in Mr. Chand's C. P. Code, Vol. I. P. 311]. But yet, they do not imply such a permanent state of things as would amount to domicile, which is the place where a person has his home. "In a strict and legal sense, that is properly the domicile of a person where he has his true fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning" (2). The word *domicile* "means much more than even a place of permanent residence," which the word *abode* does not necessarily imply [see *Gosvami v. Govardhanlalji* I. L. R. 14 B., 541. Also Wharton. Art. *abode*; see however *Fatima Begum v. Sakina Begum*, I. L. R. 1 A., 51].

Thus it may be submitted that the word "fixed place of abode," denote a place of permanent residence, which may not amount to a domicile, though a domicile may be a "fixed place of abode." So, it has been held that a person is to be deemed to reside at the place where he actually and voluntarily resides and carries on business, and not at the place where he has his family and which he only occasionally visits [*Ugarchand Mulchand v. Strajma Leherchand*, 2 Bom L. R. 605]. And where he has no permanent residence his temporary residence, or wherever he may be found, may be regarded as sufficient for purpose of jurisdiction [*Fernandez v. Wray*,* I. L. R. 25 B., 176; 3 Bom. L. R. 291].

In *ex parte Bruell* [L. R. 16 Ch. D. 487] Sir James, L. J., points out that the word "residence," has no definite technical meaning, but should be construed

(a) In England, in order that a testamentary instrument may be admitted to probate, it must be a will disposing of some property in that country; that is to say, it is this disposition that gives jurisdiction to the English Court of Probate over it [*Re Morton* (1864), 3 Sw. & Tr. 423]. But in India, as this Act provides, it is either the disposition of some property or a fixed place of abode of the deceased within the limits of the district that gives jurisdiction to the Judge [sec. 56 (P)]; and where the application is made to the District Delegate, it is a fixed place of abode only that gives him jurisdiction [sec. 58 (P)].

* This case was decided on the basis of the words used in the C. P. Code of 1882.

(1) Wharton. Art. "Abode."

(2) Wharton Art Domicile.

in every case in accordance with the object and intent of the Act in which it occurs. See section 5, Indian Succession Act; also see sections 57 (P), and 58 (P), *infra*.

The words used in the Civil Procedure Code (V of 1908) are "actually and voluntarily resides, or carries on business, or personally works for gain" (sec. 16). The word "reside" is also used [Or. V. r. 9 (1)].

§ 4. "Any property."—It is sufficient, for the purpose of giving jurisdiction under this section, that "property claimed as the testator's own should be actually in the possession of the deceased," irrespective of any title to it. Hence, if there is property in the possession of the testator at the time of his death, which is claimed by him as being in his possession in his own right, it is not for the Court to enter into the question whether the title under which he holds the property is good or bad [*Run Bahadur Singh v. Moharane Rajrup Koer*, 4 C. L. R. 498].

Such moveable property as one carries in his person, as a watch and chain, is sufficient to give jurisdiction, although the place of abode may be of a temporary nature [*In the goods of Mohendra Narain Roy*, 5 C. W. N. 377]. But some earthen pots and similar other articles, that is, property of very trifling value, are not sufficient [*Rai Mancha v. Bai Ganga*, 1 Bom. L. R. 666]. See *infra*, sec. 57, (P), No. & Com. last para.

Where a will was executed in Bombay devising immoveable property in Thana, it was held that the District judge of Thana had jurisdiction to grant probate of that will, the fact that it was executed in Bombay not having affected the provisions of this section [*Ravji Ranchod Naik v. Vishnu Ranchod Naik*, 1 L. R. 9 B, 241].

So it has been held that the provisions of this section are general and quite irrespective of the place where the will was executed, or of the nationality of the testator or of the place of his domicile. Thus a District judge has jurisdiction to grant probate of a will executed out of British India by a person who is not a British subject, if the testator had, at the time of his death, moveable or immoveable property within the jurisdiction of the judge [*Bhanrao Dadajirao v. Lakshmi Bai*, 1 L. R. 20 B, 607; see *Golam Sobhan alias Saboo Meah v. Mahomed Rouf*, 20 W. R. 286].

173. 57 (P).—When the application is made to the
241 (S)

Disposal of application made to Judge of district in which deceased had no fixed abode.

Judge of a district in which the deceased had no fixed abode at the time of his death, the Judge may, in his discretion, refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, grant them absolutely, or limited to the property within his own jurisdiction.

NOTES AND COMMENTARIES.

In *Bhanrao Dadajirao v. Lakshmibai* (I. L. R. 20 B., 607), the testator was a subject of Boroda State and the will was executed at Boroda, but the testator had left immoveable property situate in the District of Belgaum where the petition was made. The District judge rejected the petition and referred the case to Boroda applying this section by analogy. There was no finding as to where the domicile of the testator was. Sir Charles Farran, C. J., in setting aside this order laid down as follows :—

“When between Courts of different Districts in British India there is a question as to which of such Courts can most justly or conveniently grant probate, the judge has a discretion to refer the applicant to the more convenient Court : but where there is no Court of concurrent jurisdiction in British India to which the applicant can apply for probate, the Judge is vested with no such discretion. An executor whose testator has left property in British India is entitled to probate of the will in the Court in British India which has jurisdiction in the case, or where there is more than one such Court, in the most convenient of them. Boroda is not a District within the meaning of the Act, and the judge has no discretion to refer the applicant to the Boroda Court. Analogy has no place in the case of a positive enactment such as this.” [*Bhanrao Dadajirao v. Lakshmibai, supra*].

Property within the jurisdiction being of very trifling value, the Court may, in the exercise of the discretion under this section, refuse the application, if in his judgment it could be more conveniently disposed of in another district [*Bai Mancha v. Bai Ganga*, 1 Bom. L. R. 666]. See *supra*, sec. 56 (P), § 4.

174. **58 (P)**
241A (S).

Probate and letters
of administration
may be granted by
Delegate.

may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death, had his fixed place of abode within the jurisdiction of such Delegate.

NOTES AND COMMENTARIES.

This is section 241A of the Indian Succession Act. It was added to that Act by section 3 of the District Delegates Act, 1881 (VI of 1881). In section 241A, the word “resided” is substituted for the words “had his fixed place of abode” in this section. The words “fixed place of abode” are intended to mean a dwelling place of a more permanent character than what the word “residence” means. It is quite probable, these words are used in this

Act because the Hindus, &c., for whom it is intended, are more permanent dwellers in the country than those to whom the Indian Succession Act is applicable and for whom the word "residence" is used. Thus showing, as it seems, the intention of the Legislature as to the true signification of the words "fixed place of abode." Although the Legislature is presumed to use the same language in the same sense, when dealing at different times with the same subject, it is also to be presumed "that any change of language is some indication of a change of intention" (1).

The jurisdiction of the District Delegate is, under this section, to be determined only by the fixed place of abode of the deceased at the time of his death, such Delegate having nothing to do with the existence or non-existence of any property of such deceased within his jurisdiction. This is so, perhaps because property may not exist within the jurisdiction of every Delegate where there are more than one under a single District judge.

175. 59 (P).—^{242 (s)}Probate or letters of administration shall

Conclusiveness of probate or letters of administration.

have effect over all the property, moveable or immoveable, of the deceased throughout the Province in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall been granted.

Provided that probates and letters of administration granted—

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had his fixed place of abode* situate within the jurisdiction of such Judge; and such Judge certifies that the value of the property affected beyond the limits of the Province does not exceed ten thousand rupees,

* Here also the words "or any property, &c." are omitted.

shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.*

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *"Province."*

§ 3. *"High Court."*

§ 4. *Effect of probate according to the jurisdiction of the Court granting it.*

§ 5. *Effect of probate according to the nature of the appointment of executors.*

§ 1. **The section.**—This is section 242 of the Indian Succession Act, as amended by section 2 of Act XIII of 1875 and explained by section 1 of Act II of 1874. The Proviso added to section 242 of the Succession Act by section 2 of Act XIII of 1875,† was to the following effect :—

"Provided that probates and letters of administration granted by a High Court after the first day of April, 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India."

This section, "whilst stating that the probate shall be conclusive as to the representative title, is silent as to its effect with respect to the validity and contents of the will. (a) Its conclusive effect in the latter respect is really the

* This proviso was substituted for the original one by section 3 of Act VIII of 1903 (Probate and Administration Act, 1903). The proviso as it originally stood, was to the following effect :—

Provided that probates and letters of administration granted by a High Court established by Royal Charter, or by the Chief Court of the Punjab, or by the Court of the Recorder of Rangoon, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

A similar proviso with the addition of the words "and estate" after the word "property" in clause (b) was added to section 242 of the Indian Succession Act, by section 2 of Act VIII of 1903.

† Repealed by section 4 of Act VIII of 1903 (Probate and Administration Act, 1903).

(a) **"Conclusive as to representative title."**—By the combined effect of this section and section 12 (P), *ante*, probate of a will, when granted, establishes the will from the death of the testator and clothes the executor with a representative title, and such title is conclusive. So that, by virtue of this section a probate is conclusive in its effect only so far as this representative title is concerned. There is nothing in this section to show that this conclusiveness can be extended to any other matter. Nor is there any other section in this Act authorising such extension. This view is supported by the judgment of their Lordships of the Judicial Committee in the case of *Kurutulain Bahadur v. Peara Sahab*, [L. R. 32 I. A. 244; 1 L. R. 33 C. 116; 7 Bom. L. R. 876; 2 A. L. J. 758; 15 M. L. J. 336; 9 C. W. N. 938; 1 C. L. J. 594], in delivering which Sir Arthur Wilson said : "The title thus conferred upon every executor who has obtained probate is obviously convenient as tending to facilitate the administration of the estate of the deceased, and the adjustment of the rights of all parties connected with it" [see *Lalitmohan Das v. Radharaman Saha* (1911), 15 C. W. N. 1021; 13 C. L. J. 547, 555]. See also *supra*, sec. 12 (P) § 3 a.

It is, however, established from the nature of the grant and the exclusive jurisdiction of the Court of Probate, as already seen, that probate is conclusive as regards the execution of the will, the validity and genuineness of the will and the appointment of executor [sec. 12 (P) *supra*]. But, the validity and genuineness of the will being thus conclusive, does it follow that all the contents of the will are also to be held conclusive ? This is a question which seems to be still unsettled.

legal consequence of the exclusive jurisdiction of the Court of Probate." See the observations of White, J., in *In re Bhaba Soondary Dabee* (I. L. R. 6 C., 460, at 463). See sec. 12 (P) § 2, *ante*.

This section corresponds to section 23A of the Administrator-General's Act, 1874 (II of 1874), and sec. 24 of the Act of 1913 (Act III) under which the High Court may, by its grant in its own Presidency, direct that, such grant shall take effect throughout the other Presidencies [see sec. 3, Administrator General's Act, 1881, (Act IX of 1881); also see *In re Hewsan*, I. L. R. 4 C., 770; 4 C. L. R. 42].

§ 2. "Province"—See definition, *ante*.

The word "province" in this section does not correspond to the words "Presidency of Bengal," as defined in the Administrator-General's Act, 1874

Conclusive as to contents of will.—The earliest case in which any reference to it was made is that of *Braja Nath Dey Sarkar v. Anandmoyi Dasi* [8 B. L. R. 208]. In that case Phear, J., referring to sections 187 and 242 of the Indian Succession Act (the last corresponding to this section) said: "The effect of these two sections really is to make the probate the title of the executor to the property and also to make it evidence of the contents of the will itself against all persons interested under the will." His Lordship said nothing as to whether such evidence was conclusive or not. It is, however, probable that he meant to indicate that it was so. The next case is *In re Rhobo Sundari Dabee* [I. L. R. 6 C. 460] in which White, J., expressed an opinion to the effect that the conclusiveness of probate with respect to the validity and contents of the will follows as a necessary consequence from the exclusive jurisdiction of the Court of Probate. Mr. Justice Field, however, in the same case expressed grave doubts as to such conclusiveness. He referred to section 62* of the English Court of Probate Act of 1857 (20 and 21 Vict. c. 77) and observed as follows:—"The section which I have just quoted (sec. 242 of the Succession Act) affirms and enacts the conclusiveness of a grant of probate or administration as to the representative title merely, and it is a matter of observation that in this Act, passed in 1865, no provisions were introduced similar to those which I have just quoted from the Court of Probate Act of 1857, declaring a probate of will to be conclusive evidence in all Courts and in all proceedings of the validity and contents of the will itself." The last case is that of *Kurutulain Bahadur v. Peara Sahab, supra*, in which, as already seen, their Lordships of the Judicial Committee purported to hold that by the effect of probate a party claiming adversely to the will is not estopped from denying the contents of the will.

Thus, although the question was never directly raised and decided it may be taken as fairly established that probate is not conclusive evidence in respect to such contents of the will as do not constitute or appertain to the representative title of the executor against parties interested under the will or claiming adversely to it [see sec. 12 (P) *supra*, § 3a]. In support of the correctness of this view it may be further submitted that, as held in *Lukshman Dada Naik v. Ramchandra Dada Ndik*, [1 B. H. C. R. 561] the statement in a will as to the value of the testator's property is no evidence of such value; nor is a recital of a power of attorney any conclusive evidence of such power [*Bomanjee Muncharjee v. Syed Hoosain Abdoolah*, 1 Moo. I. A. 494]. The opinion of Mr. Justice Phear so far as it purports to uphold the conclusiveness of the contents, is clearly *obiter*, and that of Mr. Justice White is expressly borrowed from Williams' Executors and Administrators, and cannot, therefore, be regarded as independent of the above-mentioned provision of the English Court of Probate Act.

Where a Hindu widow alienated her husband's property and a suit was instituted to set it aside, a statement made by the widow in a will executed by her some years before such suit as regards her relatives, was held by the Privy Council to be conclusive evidence in respect to the respondents relationship [*Kidar Nath v. Mathu Mal* (1913) I. L. R. 40 C., 555].

* Section 62 of Stat. 20 and 21 Vict. c. 77 provides *inter alia* that where probate of a will is granted in solemn form, the probate "shall endure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, * * * shall, in all Courts and in all suits and proceedings affecting real estate * * * be received as conclusive evidence of the validity and contents of such will."

(Act II of 1874), and does not therefore include the Punjab. Where, therefore, a testator died in the Punjab leaving assets there, and his executor being out of the local limits of the ordinary civil jurisdiction of the Court, appointed an attorney who applied and obtained letters of administration with the will annexed from the Calcutta High Court, it was *held* that, having regard to the provisions of this section (1st para), such letters did not operate to extend the power of the grantee to administer assets in the Punjab, and further, that the High Court had no power to make such grant (*In the goods of Duncan*, 1 B. L. R. O. C. 3).

Before the passing of Act XIII of 1875, the result of this section was that, an ordinary grant of letters of administration by one of the High Courts in India did not operate beyond the limits of the Province within which that Court exercised its jurisdiction [*In re Nechterlein*, 1 B. L. R. 19; *In re Duncan supra*].

§ 3. "High Court"—The words "High Court" in this section shall mean and be deemed always to have meant—(a), a High Court for the time being established under 24 and 25 Vict., c. 104; (b), the Chief Court of the Punjab; and (c), the Court of the Recorder of Rangoon." See sec. 87 (P), *infra*.

§ 4. Effect of probate according to the jurisdiction of the Court granting it.—By virtue of this section, probate or letters of administration granted in Bengal has or have no effect in any other Province and *vice versa*. But since the passing of Act XIII of 1875, such grants, if made by the High Court, &c. (see proviso) shall have effect throughout British India.

If however, a testator leave property within the jurisdiction of two District Courts in two different Provinces, and nothing within that of any of the High or Chief Courts, it seems, two different grants shall have to be taken, one an ordinary grant and the other a grant under section 5 (P), *ante*.

Zanzibar being for the purpose of probate, a district in the Presidency of Bombay (see *ante*, def. of British India), probate granted by the Zanzibar Court has effect over the property and estates of the deceased in Bombay; evidently, therefore, property and estate situate in Bombay are "estate and effects for and in respect of which the probate is to be granted" [*Macleod v. Consul-Gen.*, Zanzibar, 8 Bom. L. R. 725].

The High Court cannot, under this section, make a grant of probate limited to property in any particular Province or Presidency, in a case where an unlimited grant had already been made before the passing of Act XIII of 1875. In *In re Shama Charan Mullick* [1 L. R. 1 C., 52; 24 W. R. 206], the testator died in 1872, leaving property and effects within the local jurisdiction of the Calcutta High Court, and also within that of the Bombay High Court. He left a will dated 8th March 1863, and a codicil dated 20th November 1865. His executors took probate of the will and codicil on the 1st August 1874, with respect to the property and effects within the jurisdiction of the High Court at Calcutta. An application was subsequently made to the Calcutta High Court for a grant of probate limited to property in Bombay, and a certificate under section 3 of Act XIII was asked for. This application was refused by Markby, J. on ground of want of power. An appeal being preferred, Sir Richard Garth, C. J., after reciting the preamble of Act XIII of 1875, said:—

"The Act then in effect provides that an unlimited grant of probate made by a High Court after the first day of April 1875, shall, unless otherwise

directed by the grant, extends to all goods belonging to the testator throughout British India; whereas before the Act, a similar grant would only have extended to goods in the particular Province in which it was made. The object of the Act being thus plainly pointed out by the preamble, it appears to me that the Act did not empower a Judge of this Court to grant a limited probate extending to goods in another Province, after an unlimited grant had already been made before the Act was passed, extending only to goods in the Province of Bengal. The view taken by Markby, J., was quite right."

§ 5. Effect of probate according to the nature of the appointment of executors.—Probate granted to executors whose appointment is general and absolute is also itself general and absolute in its powers, and it extends over all property situate within the reach of the Court which grants it. So, "If the executor be appointed during his life, or the executrix be appointed during her widowhood, the same absolute powers are given" (1). The combined effect of this section and section 187, Indian Succession Act, is to make the probate the title of the executor to the property, and also to make it evidence of the contents of the will itself as against all persons, and executors, legatees, or others interested under the will. [*Braja Nath Dey Sircar v. Ananda Moyi Dasi*, 8 B. L. R. O. C. 208]. See sec. 12 (P) § 2.

176. 60 (P)^{*}
242A (S)—(1) Where probate or letters of administration has or have been granted by a Court with the effect referred to in the proviso to section 59, the High Court or District Judge shall send a certificate thereof to the following Courts, namely:—

Transmission to High Courts of certificates of grants under proviso to section 59.

- (a) when the grant has been made by a High Court, to each of the other High Courts,
- (b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts.

* This section was substituted for the original one by section 3 of Act VIII of 1903 (Probate and Administration Act, 1903). The corresponding section of the Indian Succession Act was also amended with slight verbal alteration only. Section 60 (P), as it originally stood, was to the following effect:—

Whenever a grant of probate or letters of administration is made by a Court with such effect as aforesaid, the Registrar, or such other officer as the Court making the grant appoints in this behalf, shall send to each of the other Courts empowered to make such grants a certificate to the following effect:—

[Here follows the certificate which is the same as in the substituted (new) section given above], and such certificate shall be filed by the Court receiving the same

(2) Every certificate referred to in sub-section (1) shall be to the following effect, namely :—

“ I, A. B., Registrar [*or as the case may be*] of the High Court of Judicature at [*or as the case may be*], hereby certify that on the day of the High Court of Judicature at [*or as the case may be*] granted probate of the will [*or letters of administration of the estate*] of C. D., late of, deceased, to E. F. of and G. H. of, and that such probate [*or letters*] has [*or have*] effect over all the property of the deceased throughout the whole of British India ;”

and such certificate shall be filed by the High Court receiving the same.

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 62 and 64, to be situate within the jurisdiction of a District Judge in another Province, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same.

The section corresponds to section 242A of the Indian Succession Act, which was added to it by section 2 of Act XIII of 1875 [now repealed by sec. 4, Act VIII of 1903]. See Administrator-General's Act, IX of 1881, sec. 3.

With every certificate to be sent to a High Court under the provisions of this section the Registrar shall send a copy of the inventory of the property and effects of the deceased (1).

177. ^{243 (s)} 61 (P).—The application for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate or administration, and no

Conclusiveness of application for probate or administration, if properly made and verified.

such grant shall be impeached by reason that the testator or

(1) Belch. Rule 676, p. 324.

intestate had no fixed place of abode, or no property, within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

NOTES AND COMMENTARIES.

§ 1. The section.—This section is founded upon section 47 of the English Court of Probate Act, 1857 (20 and 21 Vict. C 77), which enacts that “such affidavit shall be conclusive for the purpose of authorizing the grant, by the District Registrar, of probate or administration; and no such grant of probate or administration shall be liable to be recalled, revoked or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the District at the time of his death; and every probate or administration granted by any such District Registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of a defect in such affidavit, as is hereby required.”

§ 2. Object of the section.—This section is enacted for jurisdictional and not for fiscal purposes, its object being to authorize the grant of administration and render it conclusive even though there might be incorrect statements or omissions in the application upon which the grant is issued. It has no reference to the valuation of the estate for the purpose of levying a Court-fee upon it [*In the goods of Sassoon*, I. L. R. 21 B., at 676].

§ 3. “Unless by a proceeding the Court.”—In *In the good of Rose Anne D’Silva* (I. L. R. 25 A., 355), after the petitioner had obtained letters of administration from the District Court, it was discovered that the deceased’s property was outside the jurisdiction of that Court. This being so, an application for grant of letters was made to the High Court, but that Honorable Court declined to make any grant whilst the letters granted by the District Court were subsisting, and directed the petitioner to obtain the revocation of the letters granted to him by the District Judge. This being done, the High Court granted letters of administration. Thus making a false suggestion made in ignorance a *just cause* for revocation. See *supra*, sec. 50 (P), F. n. p. 99.

178. 62 (P).
244 (S)—Application for probate or for letters of administration with the will annexed shall
Petition for probate. be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will, or, in the cases mentioned in sections 24, 25 and 26, a copy, draft, or statement of the contents thereof, annexed, and stating

the time of the testator’s death,

that the writing annexed is his last will and testament,
or as the case may be,

that it was duly executed,

the amount of assets which are likely to come to the
petitioner's hands ;

and, where the application is for probate, that the peti-
tioner is the executor named in the will.

In addition to these particulars, the petition shall further
state,

when the application is to the District Judge, that the
deceased at the time of his death had a fixed place of abode
or had some property situate within the jurisdiction of the
Judge ; and,

when the application is to a District Delegate, that the
deceased at the time of his death had a fixed place of abode
within the jurisdiction of such Delegate.

When the application is to the District Judge and any
portion of the assets likely to come to the petitioner's hands
is situate in another Province, the petition shall further state
the amount of such assets in each Province and the District
Judges within whose jurisdiction such assets are situate*.

NOTES AND COMMENTARIES.

1. <i>The section.</i>	§ 10. <i>High Court rule (Original Side).</i>
2. <i>"Some property.....Judge."</i>	
3. <i>"The amount of assets."</i>	§ 11. <i>Notice to Revenue authorities.</i>
3 a. <i>Statement of assets.</i>	§ 12. <i>Duty when payable.</i>
4. <i>"Copy, draft, &c."</i>	§ 13. <i>Amendment of petition.</i>
5. <i>Limitation.</i>	§ 14. <i>Where will in the possession of another person.</i>
6. <i>Petition in forma pauperis.</i>	
7. <i>Application for unlimited grant.</i>	§ 15. <i>Where will deposited under the Registration Act.</i>
8. <i>Res judicata.</i>	
9. <i>"Executor named in the will."</i>	

* A similar clause was added to the corresponding section of the Succession Act.

A suggestion :—It may be submitted that a clause stating the names of the relatives or persons interested in the estate of the deceased, may be added to the form of the petition for probate given in this section. For otherwise, no opportunity is given to the Court to decide whether any special citation ought to issue in the absence of which a grant may be revoked. In *Elokeshi Das v. Hari Prosad Soor* [30 C., 528 ; 7 C. W. N. 450] the argument of Mr. Sinha for the appellant, is quite suggestive on this point.

§ 1. **The section.**—The last clause in this section was added by section 3 of Act VIII of 1903, and the clause preceding it was added by section 4 of Act VI of 1881.

§ 2. **"Some property.....Judge."**—See sec. 56(P), *supra*.

§ 3. **"The amount of assets."**—These words mean, all the assets which are likely to come to the petitioner's hands, not merely such part of them as the petitioner chooses to name (*Kuppayammal v. Ammani Ammal*, I. L. R. 22 M., 345]. They were added by section 3 of Act VI of 1889, and they included assets likely to come to the petitioner's hands from any quarter, within or without British India. "The object of section 3" (of Act VI of 1889), says Mr. Justice Strachey, late of the Bombay High Court, * * * "in requiring the executor to state in his application for probate the amount of assets which were likely to come to his hands, was to furnish a basis for testing the accuracy of the subsequent inventory and accounts. * * * It follows that the intention of the Legislature in requiring the amount of the assets likely to come to the executor's hands to be stated, was not to make the property in respect of which the probate is granted anything different from what it had been before the passing of Act VI of 1889" [*In re Ezekiel Joshua Abraham*, I. L. R. 21 B., 139, at 152]. See secs. 64 (P) and 98 (P), *post*.

In stating the amount of assets the executor is required to be particularly careful, remembering, that in case of any omission by mistake or otherwise, the principle that "where a party has the means of knowledge it may be evidence of actual knowledge" will always apply to fix him with liability [see *Bibee Solomon v. Abdool Azeez*, 8 C. L. R. 169].

§ 3a. **Statement of assets.**—The statement of assets must be accompanied by an affidavit*. But such affidavit need not be as full as an executor's inventory of assets; it will be sufficient if the total amount of cash and household goods, outstandings, book-debts and stock-in-trade, are given under these respective heads.

So, full particulars of Government securities, shares, stock, debentures and other securities, must be given, and their value on the day of presentation of the petition should be stated. The value is to be calculated on an average of the buying and selling rates of the day. Where the market value includes the accruing dividends it should be so stated. In all other cases the interest, dividend or profit must be calculated to the same day and separately stated under each item.

So also, arrears of rent or profits (of immoveable property) due at the date of death of the testator must be stated; and rents and profits received or accrued since that date must be calculated to the date of presentation of the petition, and if necessary, should be apportioned. These amounts must be stated separately under each item of property (1). See Court Fees Act, 1879, Sch. III, Annexure A.; also Act XI, 1899, sec. 3.

Property over which the deceased had a general power of appointment, exercised by him, must also be included in the affidavit [*Re Lakshi Narayan Ammal* (1902) 25 M., 515].

* The Administrator General is not required to file affidavit of valuation [*Re Avdall* (1899) I. L. R. 26 C., 404; 3 C. W. N. 298]. See *infra*, sec. 66 (P), § 3.

(1) See *Bakerwell's* "Practice in Test. and Intes. matters," pp. 75-76.

§ 4. "Copy, draft, &c."—Where a will has been proved beyond the limits of the Province, whether in British India, or in a foreign country, an exemplification or copy of the will shall be annexed. See sec. 5 (P), *ante*.

§ 5. **Limitation.**—It has already appeared that the Limitation Act does not apply to applications for probate or letters of administration [*In re Ishan Chandra Roy*, I. L. R. 6 C., 707; 8 C. L. R. 52; see sec 55 (P), § 15, *supra*]. In England, if three years have expired from the death of the testator, the delay is required to be explained (1). See sec. 69 (P), *post*.

§ 6. **Petition in forma pauperis**—See section 53 (P), *ante*.

§ 7. **Application for unlimited grant.**—In all cases in which it is sought to obtain an unlimited grant of probate, or letters of administration, it must be stated in the petition that, so far as the petitioner has been able to ascertain, and is aware, there are no property and effects besides those specified as required by section 277A of the Indian Succession Act, and the petitioner shall undertake, in case of its being afterwards found that there are *other* property and effects, that he will pay the Court-fee payable in respect thereof, and also, in the case of a grant of letters of administration, that he will give such further bond (of the nature contemplated by section 256 of the Indian Succession Act) with a surety or sureties as he may at any time be called on by the Registrar to give (2).

As regards application to amend a grant so as to extend its effect, see Rule No. 766.—Belch. 323. See sec. 99 (P), *post*.

§ 8. **Res judicata.**—In an application for probate of a will which was opposed by the widow of the deceased, it appeared that an application had previously been made under the Guardian and Wards Act, 1890, on behalf of the widow for a declaration that she was the guardian of the person and the property of her minor son, and that upon that application the will was found to be a forgery. In these circumstances, an application for probate being subsequently made, it was held that the question of the genuineness of the will was not barred by the operation of the rule of *res judicata* [*Chinnasami v. Harihara Badra*, I. L. R. 16 M., 380]. See sec. 55 (P), § 4, *supra*.

§ 9. **Executor named in the will.**—"The word 'named' is not to be construed to mean named *expressly*, for the appointment of an executor "may be express or by necessary implication." See sec. 7 (P), *ante*.

§ 10. **High Court rule (Original Side).**—Applications for probate in common form of a written and perfect will, written or subscribed by the testator's own hand, shall be made by petition with the will and the affidavit of the executor annexed, stating the time of the testator's death, that the writing annexed is, as he believes, the last will of the deceased, that he is the executor therein named, and that the deceased, if a British subject, left effects within the jurisdiction of the Court, and, if other than a British subject, within the Calcutta jurisdiction of the Court, and such other proof, if any, as the Court shall require (3).

§ 11. **Notice to revenue authorities.**—As regards notice to the Revenue authorities, valuation of the property and payment of Court-fees, &c.,

(1) Tr. and Coote 44, 256.

(2) Belch. 323, Rule 765.

(3) Belch. 305, Rule 740.

see Chap. III A, Act VII of 1870 (The Court Fees Act) as amended by subsequent Acts.

These supersede the former rule of the Calcutta High Court which required every petition to contain a statement showing the details as to how and on what principle the value was calculated or arrived at (see Belch. p. 322, new Ed.).

§ 12. Duty when payable.—The duty is payable before the order for grant of probate or letters of administration can be made, but not necessarily payable at the time of the application for such grant [*In the goods of Aradhoney Dassee*, 5 C. W. N. ccliv]. See, however, *In the goods of Omda Bibee* [3 C. W. N. 392; I. L. R. 26 C., 407], where it was held that the “fee is required to be prepaid to the satisfaction of the Court”.

§ 13. Amendment of petition.—Where the petitioner was found not to be an executrix expressly named or by necessary implication, the petition for probate was not allowed to be amended to include a prayer for grant of letters of administration with a copy of the will annexed [*Meherchand v. Lachmun*, 9 Punj. L. R. No. 73].

§ 14. Where will in the possession of another person.—In such a case the petitioner should make a special prayer for the production of the will under sec. 54 (P), *supra*.

§ 15. Where will deposited under the Registration Act.—Where the will is deposited with any Registrar of Assurances, the duty of the petitioner is, it seems, to file an affidavit stating the circumstances under which the deposit was made, and pray that an order might be issued to the Registrar to forward the will to the Court.

179. 63 (P).
245 (s).—In cases wherein the will, copy, or draft is written in any language other than English, or than that in ordinary use in proceedings before the Court, there shall be

In what cases translation of will to be annexed to petition.

a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or, if the will, copy or draft be in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner :—

Verification of translation by person other than Court translator.

“I (A.B.) do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof.”

According to the rules of the Calcutta High Court in cases where the will is written in any of the eastern or foreign languages and characters there shall be a translation thereof annexed by one of the sworn interpreters of that Court, if it be a language for which an interpreter is appointed, or if it be in any other language, then by any person competent to translate the same, in which last case such translation shall be accompanied by an affidavit of the translator, that he reads and perfectly understands the language and character of the original, and that the same is a true and accurate translation (1).

180. 64 (P).
246 (s)
Petition for letters
of administration. shall be made by petition distinctly written
as aforesaid, and stating
the time and place of the deceased's death,
the family* or other relatives of the deceased, and their
respective residences,
the right in which the petitioner claims,
the amount of assets which are likely to come to the
petitioner's hands.

In addition to these particulars the petition shall further state,

when the application is to a District Judge, that the deceased at the time of his death, had a fixed place of abode or had some property situate within the jurisdiction of the Judge; and,

when the application is to a District Delegate that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

When the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such assets in each Province and the District Judges within whose jurisdiction such assets are situate.

(1) Belch. Rule 741, p. 307.

Family:—As to what the word "family" imports, see sec. 80 of the Succession Act. Here the word seems to be used as equivalent to relations [see *Snow v. Teed* (1870) 9 Eq. 622].

NOTES AND COMMENTARIES.

§ 1. *The section.*§ 2. *Assets.*§ 2a. "*The amount of assets, &c.*"§ 3. *High Court Rules (Original Side).*

§ 1. **The section.**—This section corresponds to section 246 of the Indian Succession Act as amended by sections 4 and 9 of Act VI of 1881 (District Delegates Act).

The last clause was added by section 3 of Act VIII of 1903 (Probate and Administration Act, 1903), similar addition being made to the corresponding section of the Succession Act.

§ 2. **Assets.**—The word *assets* means and includes the property of a deceased person which is chargeable with and applicable to the payment of his debts and legacies [*In re Courjon*, I. L. R. 25 C., 65, 73] (1).

As "each class of Hindu property is primarily liable to debts and executions" [*Mancharji Pestanji v. Narayan Lukshumanji*, 1 B. H. C. R. 83], or, as upon the death of a Hindu his debts are a charge upon the whole estate and not upon any *special part of it*, and the whole property of the deceased vests in the executor or administrator, it has been held, that as a general rule, in all cases, general letters of administration of a Hindu's estate must be taken out for the moveable as well as immoveable property. [*In the goods of Girish Chandra Mitter*, I. L. R. 6 C., 483; 7 C. L. R. 593; see *In bonis Ram Chand Sil*, I. L. R. 5 C., 2; 4 C. L. R. 290; *Kadombini Dasi v. Kaylash Kumini Dasi*, I. L. R. 2 C., 431]. See "assets" sec. 98 (P), *post*. See secs. 42 (P), and 43 (P), *ante*.

§ 2a. **The amount of asset, &c.**—As held in *Lalitchandra Choudhuri v. Baikuntha N. Choudhury* [(1910) 14 C. W. N. 463; 15 C. L. J. 305] although it is not necessary for the Court of Probate to decide what assets are likely to come into the hands of the petitioner, it is the duty of such Court, in granting letters of administration to consider whether there is any estate at all to be administered. See *post*, sec. 85 (P), § 3.

The Punjab Chief Court is of opinion that in proceedings relating to grant of letters of administration, the District Court has no jurisdiction to decide what property belongs to the estate of the deceased [*Bhazan Das v. Mahant Ramsaran Dar* (1910) 5 Punj. W. R. 113].

§ 3. **High Court Rules (original side).**—Application for letters of administration shall be made by petition, stating the time and place of the deceased's death, the family or other relatives of the deceased and their respective residences, and in case they shall be absent from the jurisdiction of the Court, whether they have any known agents within the jurisdiction of the Court, the right in which the petitioner claims to administer, and the amount of the assets which are likely to come to his hands; and such application shall be verified by affidavit to be filed therewith, and the necessary citations shall then issue, and the application shall be advertized on Monday, in three successive weeks in the *India Gazette* (2).

(1) "Assets" includes immoveable as well as moveable property (sec. 2, Administrator-General's Act, 1913). See secs. 62 (P), *supra*, and 98 (P), *infra*.

(2) *Becht. 308, Rule 742.*

In all petitions by creditors for letters of administration, it shall be stated particularly how the debt arose, and whether the party has any and what security for the debt; and no administration shall be granted to any person claiming as a creditor where the debt arises from the balance, or the supposed balance, of an open and unsettled account, or where the creditor has security for the debt (1).

181. 65 (P)
246 A (S). —Every person applying to any of the Courts mentioned in the proviso to section 59 for probate of a will or letters of administration of an estate, intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by sections 62 and 64, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

Additional statements in petition for probate, &c.

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

And the Court to which any application is made under the proviso to section 59 may, if it think fit, reject the same.

This section corresponds to section 246 A of the Indian Succession Act, as amended by section 2 of the Probate and Administration Act of 1903 (Act VIII of 1903).

182. 66 (P)
247 (S). —The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner or to the like effect:—

Petition for probate or administration to be signed and verified.

(1) Belch. 310, Rule 745.

"I (A. B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."

NOTES AND COMMENTARIES.

§ 1. *The Section.*

§ 3. *Verification by petitioner.*

§ 2. "*Subscribed.*"

§ 1. **The Section.**—This section may be compared with Or. VI. rr. 14 & 15 of the Code of Civil Procedure (Act V of 1908).

§ 2. "**Subscribed.**"—In section 51 of the Civil Procedure Code of 1877 the word *subscribed* was originally used. But by subsequent amendment the word *signed* was substituted for it, and that word is still in use.

The word *subscribed* has not been defined. It signifies the idea of signing with one's own hand. But the word *signed*, as defined in several acts and explained by judicial decisions, includes *marked*.

§ 3. **Verification by petitioner.**—"The object of the verification is to secure good faith in the averments of the party; as by the verification of a plaint, the plaintiff makes its statements his own" (1). The Administrator-General need not verify a petition otherwise than by his signature. [*In the goods of Avdall*, I. L. R. 26 C. 404; 3 C. W. N. 268]. See Act III of 1913, sec. 292.

183. **67 (P)**.—Where the application is for probate, or for
 248 (s) letters of administration with the will
 annexed, the petition shall also be verified by
 at least one of the witnesses to the will (when
 procurable), in the manner or to the effect
 following :—

Verification of petition for probate by one witness to will.

"I (C.D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature

(or mark) thereto (as the case may be) (or that the said testator acknowledged the writing) annexed to the above petition to be his last will and testament in my presence."

NOTES AND COMMENTARIES.

§ 1. *Verification by witness.*

§ 3. *Miscellaneous.*

§ 2. "*When procurable.*"

§ 1. **Verification by witness.**—In England, where there is no attestation clause to a will, or if such clause is defective or insufficient, the usual practice is to require an affidavit from at least one of the subscribing witnesses as evidence of due execution of the will (1). The operative part of such affidavit is worded thus :

"—and that the said testator executed the said will * * * by signing his name at * * * as the same now appears thereon, in the presence of me and of—the other subscribed witness thereto, both of us being present at the same time; and we thereupon attested and subscribed the said will in the presence of the said testator" (2).

It seems, the verification prescribed by this section is a substitute for this affidavit, though there is marked difference in the wording between the two.

§ 2. "**When procurable.**"—There is no provision in this Act as to what is to be done when an attesting witness is not procurable and the required verification cannot be made. It seems, in such case the verification will be dispensed with, and so far as *moffassil* practice is concerned, the fact that such witness is not procurable shall be required to be proved to the satisfaction of the Court by affidavit or otherwise. In *In re Bhuttomoni Davi* unreported no attesting witnesses being procurable, certified copies of their deposition in a previous proceeding under Act XXVII of 1860, were accepted by the Court and treated as a substitute for the required verification, and probate granted (3). See sec. 69 of the Indian Evidence Act (Act I of 1872).

§ 3. **Miscellaneous.**—In a suit for revocation of probate on ground of undue influence and incapacity, the affidavit of one of the attesting witnesses who could not be found and which had been made eight years before, was allowed to be read as evidence of execution and testamentary capacity [*Gornall v. Mason*, 12 P. D. 142] (4).

184. ^{oo (P)}_{249 (S)}.—If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be subject to punishment

Punishment for false averment in petition or declaration.

(1) Tr. and Coote 83, 84.

(2) Tr. and Coote 691, 692.

(3) Decided by Mr. Justice Norris on the 14th March 1893. It is reported in 2 Law Record, 86,—a Law Journal published in Calcutta.

(4) Tr. and Coote 421.

according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence.

See sections 191 to 200 (both inclusive) of the Indian Penal Code (Act XLV of 1860).

185. 69 (P).^{250 (S).}—In all cases it shall be lawful for the District Judge or District Delegate, if he

District Judge may
examine petitioner
in person,

thinks fit (a).

to examine the petitioner in person upon oath, and also

to require further evidence of the due execution of the will, or the right of the petitioner to the letters of administration, as the case may be, and

require further evi-
dence,

to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

and issue citations
to inspect proceed-
ings.

The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the District, and otherwise published or made known in such manner as the Judge or Delegate issuing the same may direct.

Publication of cita-
tion.

Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another Province, the District Judge issuing the

(a) "If he thinks fit": —These words are clear enough to show that it is discretionary with the Judge to issue citations upon persons interested in the estate of the deceased. But this may be so in the Original Side of the High Courts where the practice of the Courts in England prevails and common form grants, properly so called are made. As regards Maffasil, it is not clear whether the Judge can wholly dispense with the issuing of citations. Illustration (b) appended to sec. 50 (P), *supra*, shows that, absence of citation upon parties who ought to be cited, is a "just cause" for revocation of grant under that section. It may be argued that illustration (b) contemplates special citations and such citations only are in the discretion of the Judge to issue. In this view "citations" in this section must be held to include general as well as special citations, the issuing of the latter being discretionary.

same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself and shall certify such publication to the District Judge who issued the citation.*

NOTES AND COMMENTARIES.

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| 1. <i>The section.</i> | (q) <i>Date of will, value of.</i> |
| 2. <i>Preliminary.</i> | (r) <i>Adequate evidence.</i> |
| 3. <i>"Fetitioner in person."</i> | (s) <i>Where testator blind.</i> |
| 4. <i>"In all cases."</i> | (t) <i>Proof of interlineation or interpolation.</i> |
| 5. <i>General rule governing all grants.</i> | (u) <i>Will in duplicate, proof of.</i> |
| 6. <i>"Evidence of due execution of the will."</i> | (v) <i>How evidence to be recorded.</i> |
| (a) <i>Due execution, what it implies.</i> | (w) <i>Delay in propounding will, effect of.</i> |
| (b) <i>Formalities to be observed.</i> | (x) <i>Improbability.</i> |
| (c) <i>Evidence in uncontested cases.</i> | (xa) <i>Attestation by testator's servants and dependants.</i> |
| (d) <i>" " " contested " "</i> | (y) <i>Evidence of execution cannot be dispensed with.</i> |
| (e) <i>In all cases, safer to produce all evidence.</i> | (ya) <i>Where evidence of handwriting of attesting witness sufficient.</i> |
| (f) <i>Where strict affirmative proof of attestation not necessary.</i> | (yb) <i>Tendering witness for cross-examination.</i> |
| (g) <i>Internal evidence and nature of signature, value of.</i> | (z) <i>When probate may be refused.</i> |
| (ga) <i>Contents of will value of.</i> | § 7. <i>Questions triable by the Probate Court and rules of practice.</i> |
| (h) <i>Absence of material witness.</i> | § 8. <i>Citations.</i> |
| (i) <i>Where evidence very conflicting.</i> | § 9. <i>Citations, High Court Rules (Original Side).</i> |
| (ia) <i>Where circumstances excite suspicion.</i> | § 10. <i>"Persons claiming to have any interest."</i> |
| (j) <i>Where knowledge and approval of contents by the testator may be presumed.</i> | § 11. <i>Proceedings.</i> |
| (ja) <i>Where the knowledge of a third person is sufficient.</i> | § 12. <i>Object of seeing proceedings explained.</i> |
| (k) <i>Previous intention, weight of.</i> | § 13. <i>Pleading.</i> |
| (l) <i>Acquiescence in the provisions of the will, value of.</i> | § 14. <i>Estoppel.</i> |
| (m) <i>Facts in favour of execution.</i> | § 15. <i>"And otherwise published."</i> |
| (n) <i>Arbitration.</i> | § 16. <i>Presumptions.</i> |
| (o) <i>Declarations by testator.</i> | § 17. <i>Onus.</i> |
| (p) <i>Will 30 years old.</i> | |

§ 1. **The section.**—This section, which corresponds to section 250 of the Indian Succession Act, lays down the procedure necessary for "proving

* This clause was added by section 3 of Act VIII of 1903 (Probate and Administration Act, 1903), with similar addition to the corresponding section of the Indian Succession Act.

the will" and for grant of administration. "As not only the title of the executor is founded upon his testator's will, but as the latter also contains the specific rules and limits of his conduct in the administration of the estate, it is obvious that a proceeding should be required of him which shall procure for it a legal stamp and currency, by the confirmation of his title" (1).

This proceeding is called proving the will. It includes taking out probate, for, as Lord Macnaughten says, 'Proving the will,' "is merely a compendious form of language signifying that the will has been proved in due form, and that probate has been granted by the proper Court." [See *Mohamidu Mohideen Hadjiar v. Pitchay*, L. R. (1894) A. C. 437].

§ 2. Preliminary.—A will may be proved in two ways—either in Common Form, or by Form of Law. The latter mode is called the Solemn Form, or proving *per testes* (2). Thus a probate is termed *Probate in Common Form* or *probate in Solemn Form*, according as it is granted in Common Form or in Solemn Form (3).

A will is proved in Common Form, when the executor presents it before the Judge, and in the absence, and without citing the parties interested, produces witnesses to prove the same (4). Generally a will is so proved simply on the oath or credit of the executor or party propounding it (5). This is what in this country is called proving *summarily*, "that is, without any opposition, and merely *ex parte*, to the satisfaction of the Judge." [See observations of markby, J., in *Komollochun Dutt v. Nilruttun Mundle*, I. L. R. 4 C., 360 at 364] (a).

A will is said to be proved in Solemn Form, or form of law *i.e.*, *per testes*, when it is proved "in the presence of such as may pretend any interest in the goods of the deceased, or at least in their absence, after they have been lawfully summoned to see such will proved if they think good" (6).

But the business of the Court of Probate is not confined to the granting of probate only; it has to grant letters of administration also, either with will, or without will. Hence the business of the Court of Probate is of two kinds—non-Contentious or Common Form business (b) and Contentious or

(a) In *Durgagati Debi v. Sourabini Debi* [10 C. W. N. 955; I. L. R. 33 C., 1001] Mr. Justice Brett very properly objects to the application of the term *common form* in grants made in the Maffasil. He says: "This is not quite the same as a grant of probate in common form, for the grant is made after the execution of the will has been sworn to by the witness to the will, and the only circumstance which distinguishes it from the grant in Solemn Form is that the grant is made *ex parte*."—There is another reason, perhaps a stronger one, in support of his Lordship's view. This is the fact that in England, Common Form grants are made "without citing the parties" so that there is neither any citation [see *infra* § "object of citation"] (7) nor any hearing (8). In this country and under this Act, as already seen [sec. 50 (P) §], no grant can be made without citing all persons claiming to have interest in the estate of the deceased.

(b) 'Common Form business' (termed also non-contentious business) is defined in 20 and 21 Vict. c. 77, sec. 2 to "Mean the business of obtaining probate and administra-

(1) Tr. and Coote 44; Coote 41.

(2) Wms. 329; Bro. P. P. 99; Walker and Elg. 30.

(3) Bro. P. P. 99, 201; Tr. and Coote 351.

(4) Wms. 330; Tr. and Coote 352; Walker and Elg. 30.

(5) Shep. T. 499; Tr. and Coote 352; Walker and Elg. 30.

(6) Shep. T. 499; Walker and Elg. 30; Wms. 337.

(7) See Wms. 238, 10th Ed.

(8) Road. § 797.

Solemn Form business. Where there is no contest as to the title to probate or to administration, the business is non-contentious or Common Form ; and where there is a contest as to such title, the business is Contentious or solemn Form business (1).

"Probate business becomes contentious upon a writ of summons being served on a party interested, or supposed or claiming to be interested therein, and continues to be contentious until the termination of the action commenced by the writ of summons" (2). See secs. 73 (P) and 83 (P), *post*.

Thus, it is not any real contest or opposition, that makes the business contentious or the grant in Solemn Form, but it is the "writ of summons being served on a party interested," that constitutes the essential requirement of a business or grant in Solemn Form. Hence there may be a decree for probate in Solemn Form, in a contested as well as in an uncontested case (3).

An executor may, of his own motion, and for his own protection, himself prove the will in the first instance, in Solemn Form, if there is any doubt as to the validity of such will, or there is a possibility of any future opposition to it (4). In order to do this he has only to cite the next-of-kin, and all those who "may pretend any interest in the goods of the deceased," to come and see the proceedings before the grant is made. By this method the executor secures the advantage of having the evidence of all the material witnesses, who might otherwise be removed by death, if he should at any later period be called upon to establish the validity of his will (5).

The difference in effect between a probate in Common Form and one in Solemn Form is, that the former is revocable, and the executor may at any time, be compelled, by a person having an interest, to prove it in Solemn Form ; and the latter, provided proper precautions have been taken, is, subject to one exception, irrevocable, so that the executor cannot be so compelled to prove it again (6). See *ante*, sec. 50 (P), § 1.

The exception is, where the decree has been obtained by fraud or collusion, or where a later will has been discovered [*Priestman v. Thomas*, L. R. 9 P. D. 70 ; see *Komollochun Dutt v. Nilrutton Mundle*, I. L. R. 4 C., 360 at 364 ; *Nistarini Dabya v. Brohmo Moyi Dabya*, I. L. R. 18 C., 45, at 46, 47] (7).

It is not that an executor (or administrator with the will annexed) who has proved the will in Common Form only, may be compelled to prove it in Solemn

tion where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.¹¹

Contentious business includes all proceedings in the Court of Probate (or in the Registries thereof) in respect of business not included in the above definition (8).

(1) Tr. & Coote 283, 284, 349 ; Bro. P. P. 9 and 10.

(2) Tr. and Coote 285.

(3) Tr. and Coote 352.

(4) Walker and Elg. 31 ; Tr. and Coote 363 ; Shep. T. 499.

(5) Wms. 339-40 ; Tr. and Coote 363 ; Walker and Elg. 31.

(6) Wms. 339 ; Tr. and Coote 353-354 ; Walker and Elg. 30-31 ; Bro. P. P. 99-100 ; Shep. T. 499.

(7) Bro. P. P. 99 ; Tr. and Coote 355.

(8) Powl. and Oakl. 823, 4th Ed.

Form; but an executor who has intermeddled in the administration of the deceased's estate, may also be so compelled [*Jackson and Wallington v. Whitehead*, 3 Phill. 577]. But a party entitled to administration with the will annexed, so intermeddling, is not compellable to prove the will [*In re Fell*, 2 Sw. & Tr. 126] (1). See sec. 50 (P), § 1, *ante*.

Before the passing of the Hindu Wills Act, the Court had no jurisdiction to compel an executor to prove the will. When, however, he actually applied for probate and submitted to the jurisdiction of the Court, he was compellable to prove it in Solemn Form [*In re Tiruvalier K. Mudali*, 1 M. H. C. R. 59].

§ 3. Petitioner in person.—It seems the Judge is empowered by this section to enforce the attendance of the petitioner in person for the purpose of examining him, if he is not present in Court.

Order X. r. 2 and Or. XVI r. 21 of the Code of Civil Procedure (Act V of 1908) provide rules for enforcing the attendance of parties and their examination on oath. See secs. 27 to 31 of the same.

§ 4. In all cases.—There may be three forms of cases or actions in a Court of Probate; that is, (a) Probate cases; (b) Administration cases and (c) Revocation cases (2). In all these cases whether *ex parte* or contested, the Judge may examine the petitioner in person.

§ 5. The general rule governing all grants.—Such general rule is, “that the Court will not act unless all the parties having any claim to the grant are either represented before it, or consent to the application, or have renounced their claim, or have been cited to appear, or in some other way have had due notice of the proceeding. And, although the Court both can and will—if it think just, dispense with the presence, consent, renunciation, or citation, of such parties, it will not do so unless satisfied that there are some special circumstances existing which render such dispensation desirable in the interests of justice” (3).

There can be no grant of probate by consent of parties, or otherwise in an “amended form” or conditionally. Either the will of the testator is proved or it is not proved. If proved, neither the Court nor the parties can make for the testator any will other than that which he has executed and which is proved. Probate, therefore, must be granted of the will so proved [see *Kamal Kumari Debi v. Narendra Nath Mukherjee*, 9 C. L. J. 19, 29, 30].

§ 6. “Evidence of due execution of the will” (4).

(a) **Due execution, what it implies.**—‘Due execution’ of a will implies not only that the testator was in such a state of mind as to be able to authorize and to know he was authorizing the execution of a document as his will, but also that he knew and approved of the contents of the instruments [see *Kuppayammal v. Ammani Ammal*, I. L. R. 22 M., 345]. In cases of disputed execution the Judge should consider and express an opinion upon both these questions [*Woomesh Chandra Biswas v. Rash Mohini Dass*, I. L. R. 21 C., 279]. As to the meaning of “due execution,” see further *ante*, pp. 98 and 125.

(1) Tr. and Coote 363.

(2) Tr. and Coote 358; Bro. P. P. 275.

(3) Powl. and Oakl 189, 4th Ed.

(4) See *ante* secs. 46 (S), § 10 (4), § 14 (3), 50 (S), and 76 (P), *post*; and also secs. 68, 69, 71 and 81 of the Indian Evidence Act (Act I of 1872).

(b) **Formalities to be observed.**—No grant of probate (or letters with will annexed) can be made unless the will has been proved in accordance with law [*Monmohini Guha v. Banga Chandra Das*, 1. L. R. 31 C., 357; *Ameer Chand v. Mohammed Bibi*, 6 C. L. J. 453]; hence, evidence of due execution must be weighed regard being had to the provisions of sec. 50 (S) *ante*. In a contested case, admission of execution before a Sub-Registrar was held to be no evidence of execution in the absence of evidence to show that all the formalities of the law had been complied with [*Obhoy Churn Mustafi v. Uma Churn Mustafi*, 1 C. L. R. 362].

Appointments by will if executed with due formalities under Section 50 (s) are valid, although the power under which they were made expressly required some additional solemnity in the execution (1). But formalities not relating to execution and attestation prescribed by the instrument creating the power, must be observed (2).

(c) **Evidence in uncontested cases.**—In uncontested cases *prima facie* proof of the execution of the will is sufficient to warrant the grant of probate. In such cases, the Maffasil practice is “to require oral proof of the execution of the will and not to rely upon the verified statements of the applicant and the attesting witnesses” [*In re Nobodoorga*, 7 C. L. R. 387; see *In re Shustee Churn Patuck*, 23 W. R. 103].

Probate granted in an uncontested case is generally termed *probate in common form*, though such term is not quite appropriate in grants made in the maffasil (see § 2, *supra*).

In the Maffasil, probate in common form, *i.e.*, in an uncontested proceeding, and *ex parte*, cannot be granted merely on affidavit [*Ramgopal Das v. Radhakrishna Das*, 10 C. W. N. xcv; 3 C. L. J. 374] (a).

In the Original Side of the High Court, the production of the will and the necessary petition and affidavits verifying its execution by the testator, are sufficient in uncontested cases. [*In re Nobodoorga*, *supra*].

A common form grants as distinguished from a Solemn form one, may be granted in this country in a contested case, if the party opposing withdraws and the contested becomes an uncontested proceeding [*Kunja Lal Chowdhury v. Kailash Chandra Chowdhury* (1910) 14 C. W. N. 1068].

(d) **Evidence in contested cases.**—In contested cases the Court is bound to consider, not only whether the alleged will was executed by the testator, but whether the will is valid or invalid, and whether probate of the

(a) It has been ruled by the Calcutta High Court that, in uncontested proceedings under this Act the Maffasil Court or Judge exercising jurisdiction therein may permit or direct that any particular fact may be proved by affidavit, provided, of course, there is no law or rule to the contrary [H. C. Rule No. 2 of 1907, dated 21st March of that year].

* * * [This is in accordance with the provisions of section 194, C. P. Code of 1882, corresponding to or. 19, r. 1, that of 1908].

But it appears that under section 68 of the Indian Evidence Act (1 of 1872), execution of a will cannot be proved by any evidence other than the oral statement of at least one attesting witness where such witness is procurable.

(1) Tayl. Ev. § 1050, 10th Ed., section 10, stat. 1, Vict. C. 26 (English Wills Act).

(2) See Hay. and Jarm. 373, 12th Ed.

will ought to be granted. "Every consideration which ought to induce the Court to refuse probate of the will must be taken into account" [*Tara Chand Chuckerbutty v. Deb Nath Roy*, 10 C. L. R. 550]. And if the will is *inofficious*, it is the duty of the party propounding it to put the Court very fully in possession of all the circumstances [*Ananda Sundari Dabi v. Jugtmoni Dabi*, 6 C. L. R. 176; *Saroda Sundari Dassee v. Muddun Mohun Shah*, 24 W. R. 162] (a).

(e) **In all cases safer to produce all evidence.**—It is, however, safer, in all cases, especially where there is contention, to produce all the evidence which the circumstances of the case indicate as proper and necessary to prove the execution of the will [see *Tara Chand Chuckerbutty v. Deb Nath Roy*, *supra*; and the observations of their Lordships of the Privy Council in *Bama Sundari Debi v. Tara Sundari Debi*, I. L. R. 19 C., 65]. So the propounder of a will made under suspicious circumstances, is bound to give the Court the most complete information for its guidance in its very difficult task, and must take the consequences, if this is not done [*Woomesh Chandra Biswas v. Rash Mohini Dass*, I. L. R. 21 C., 279, at 303,—*per* Banerjee and Pigot JJ.].

(f) **Where strict affirmative proof of attestation not necessary.**—Strict affirmative proof of due attestation is not absolutely necessary if the circumstances are such as to warrant the Court in reasonably concluding that the will was duly attested [*Sibo Sundari Debi v. Hemangini Debi*, 4 C. W. N. 204 followed in *Nitaichand Saha Banikya v. Nagani Dassya*, 10 C. L. J. 499]. Thus, where the writer of the will deposed that he had signed the will before the testator signed, and that the testator signed immediately after him, and none of the witnesses signed in his presence; but one of the witnesses said that he signed the will after the testator had personally acknowledged his signature to it, and that when he signed other witnesses' names were on the will; and of the other witnesses three were proved to have been dead and the remaining witness was not examined, but his signature as well as the signatures of the witnesses who were dead, were proved; it was held, that upon the whole evidence it could reasonably be concluded that the will had been duly attested according to law (*Ibid*). So the mere fact of an attesting witness to a will repudiating his signature does not invalidate the will, if it can be proved that he did actually sign as an attesting witness [*Nobo Kihore Dass v. Joy Doorga Dassee*, 22 W. R. 189.]

(a) The following observations of Mr. Justice Field and Mr. Justice McDonnell, are noteworthy and may well be borne in mind by the Maffasil Judges in trying cases under this section:—"We think that in all these cases in which an application is made under the Hindu Wills Act for probate or letters of administration, it lies upon the applicant to produce all the evidence which the circumstances of the case indicate as proper and necessary * * *. If an idea once gets into the mind of the people that it is an easier matter to prove a will in the Court of the District Judge than it is to prove any ordinary instrument before a Moonsiff or a Subordinate Judge a door may be opened to fraud and the operation of the Wills Act may prove to be very pernicious. A will is an instrument under which the title to immoveable property is transferred, in many cases transferred from the legitimate heir to a person who, except for the will, would have no title whatever; and we think it lies upon the person who propounds a will to prove it by evidence as good as that which would be produced to prove any other instrument transferring the title to real property; and the District Judge, in dealing with these cases should give to them the same attention which is ordinarily given to cases concerned with the title to immoveable property" [*Tara Chand Chuckerbutty v. Deb Nath Roy*, 10 C. L. R. 550].

It may be observed that although several years have elapsed from the time when the above observations were made, it seems their value still continues undiminished.

(g) **Internal evidence and nature of signature, value of.**—So, where the application is unopposed, it should not be rejected “merely upon internal evidence contained in the will” [*In re Shustee Charan Patuck*, 23 W. R. 103]; nor upon the nature of the testator’s signature,* even in a contested case [see *Bama Sundari Debi v. Tara Sundary Debi*, I. L. R. 19 C., 68, P. C.; *Romesh Chandra Mukerji v. Rajani Kanta Mukerji*, I. L. R. 21 C., 1, P. C.]. The opinion of an expert on handwriting is no evidence when he is not called as a witness [*Padma Debya v. Dharmadas Deb* (1911) 15 C. W. N. 728]. See *ante*, 46 (S), §

(ga) **Contents of will value of.**—In judging of the genuineness of a will, due weight must always be given to its contents. Thus, if the will is rational, it is to be regarded as a fact in favour of execution [*Bama Sundary Debi v. Tara Sundari Debi*, I. L. R. 19 C., 65]; or, if it happens to be inofficious, the judge ought to be vigilant and require the party propounding it to put the Court very fully in possession of all the circumstances attending its execution [*Ananda Sundari Debi v. Jagatmoni Debi*, 6 C. L. R. 176; *Sarada Sundari Dassi v. Muddun Mohon Saha*, 24 W. R. 162]. But no Court should arrive at a conclusion as regards the genuineness of a will, merely or primarily from a consideration of its contents. Where, for instance, a Judge concluded that a will was forgery primarily from a consideration of its contents which he thought to be so extraordinary as to overbalance altogether, the evidence in support of its execution, it was held that the procedure was erroneous [*Bulli Kunwar v. Bhagirathi*, 9 C. W. N. 649, P. C.; 15 M. L. J. 265].

(h) **Absence of material witness.**—Absence of material witness is not always fatal [see *Bama Sunderi Debi v. Tara Sunderi Debi*, I. L. R. 19 C., 65; L. R. 18 I. A. 134; *Woomesh Chandra Biswas v. Rash Mohini Dassi*, I. L. R. 21 C., 279; 25 C., 824; L. R. 25 I. A. 109; 2 C. W. N. 321]. See *ante* sec. 46 (S), p. 76.

(i) **Where evidence very conflicting.**—Where the evidence is very conflicting and in some respects obscure and unsatisfactory, it is the duty of the Judge patiently to investigate the actual facts, placing himself, as it were, in the position of the alleged testator with all his actual surroundings, and not to approach the subject from the point of view of what a testator ought or would be likely to have done on some preconceived idea of Hindu usages and habits of thought, or on the strength of a standard of perfection too high for ordinary course of life [*Doulat Koer v. Ramphal Das*, I. L. R. 25 C., 459; 2 C. W. N. 177—*per* Lord Macnaughten. See *Sayad Muhammad v. Fatteh Muhammad*, I. L. R. 22 C., 324—*per* Lord Halsbury]. Accordingly, probate is rightly granted where the Judge believes the witnesses who speak to the execution of the will and the disposing mind of the testator [*Shama Churn Kundu v. Khetromoni Dassi*, I. L. R. 27 C., 521; 4 C. W. N. 501; 2 Bom. L. R. 568; L. R. 27 I. A. 10].

It ought to be remembered here that the standard of proof to establish a will required by the Indian Statutes is that of a prudent man and not an absolute or conclusive one [*Jarat Kumari Dassi v. Bisseswar Dutt* (1911) 39 C., 245, *per* Sir L. Jenkins, C. J.].

* See sec. 46 (S), § 15 (1), p. 76 *ante*.

(ia) **Where circumstances excite suspicion (a).**—Whenever circumstances exist which excite the suspicion of the Court, and whatever the nature of such circumstances may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the instrument, and to judicially satisfy the Court by clear proof of volition and capacity that that instrument does express the true will of the deceased person [*Tyrrel v. Painton*, (1894) P. D. 151; *Barry v. Butlin*, 2 Moo. P. C. 480; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Gangabai v. Bhugwandas Valji*, I. L. R. 29 B., 530; L. R. 32 I. A. 142; 9 C. W. N. 769; 15 M. L. J. 271; 7 Bom. L. R. 854; 3 A. L. J. 68; *Balkrishna Ram chandra v. Gopikabai*, 7 Bom. L. R. 175; *Digambar Narayan* (1910) 13 Bom. L. R. 38; *Marmavula Venkata Krishnayya v. Annapurni Sennamamert* (1911) 10 M. L. T. 304; *Paske v. Ollat*, 2 Phill. 324; *Ingram v. Wyatt*, 1 Hagg. 391; *Billinghurst v. Vickers*, 1 Phill. 193; *Wilson v. Bassil*, (1903) P. 239] (1). See *ante*, sec. 46 (S), § 48 (S), §

(a) The following are some such circumstances.—

(1) Where the person who prepares the instrument or conducts its execution is himself benefited by its dispositions, except where it is merely the case of a small legacy to him as executor or other such circumstance. In this connection Parke, B., observes: "All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case; in some of no weight at all, * * *; varying according to the circumstances, for instance the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased" [*Barry v. Butlin*, *supra*; *Mitchell v. Thomas*, 6 Moo. P. C. C. 137].

(2) Where the testator was seriously ill and extremely weak [see *Gangabai v. Bhugwandas Valji*, *supra*].

(3) Inability of the testator to read whether from want of education or from bodily infirmity [*Barton v. Robins*, 3 Phill. 455; *In re Duane*, 2 Sw. and Tr. 590].

(4) Doubt as to his capacity at the time of execution [*Ingram v. Wyatt*, 1 Hagg. 384, 391; *Dufaur v. Craft* 3 Moo. P. C. 147].

(5) Where the testator is weak and superstitious and liable to be imposed upon [see *Lyon v. Howe*, L. R. 6 Eq. 655; *Sital Prosad v. Parbhulal*, I. L. R. 10 A., 535; *Sadashiv Bhaskar Joshi v. Dhakubai*, I. L. R. 5 B., 450].

(6) Where the will is at variance with known previous intentions of the testator, or opposed to what would naturally be his desires, and it is shown to have been executed when he was in the power of beneficiaries or their emissaries, and at a time when he was too weak mentally or physically to resist them [*Smith v. Henline*, 174 Ill. 184; *Scattergood v. Kirk*, 192 Pa. St. 263; *Baker v. Baker*, 102 Wis. 226; 78 N. W. 453].

(7) Where the instrument itself is not consonant to the testator's natural affections, and moral duties; that is, where the will is inofficious [*Brogden v. Brown*, 2 Add. 449; *Annada Sundari Debi v. Jugutmoni Debi*, 6 C. L. R. 176; *Sarada Sundary Dassi v. Muddun Mohun Shaha*, 24 W. R. 162; *Kistochurn Mozumdar v. Dwarkanath Biswas*, 10 W. R. C. R. 32; *Sarada Sundari Dassee v. Tincowry Nundee*, 1 Hyde, 223, at 248]. See *ante*, def. "Inofficious will."

(8) The fact that the testator is a Hindu *pardanashin* lady, is also a circumstance which, generally speaking, ought to excite the suspicion of the Court. See *ante*, sec. 48 (S), §

(1) Wms. 255, 10th Ed.; Powl. and Oak. 20, 4th Ed.

The suspicion above referred to is that suspicion which arises from facts and circumstances which are undisputed or proved beyond all doubt. It is not the suspicion which arises from conflicting evidence or from the fact that the witnesses cannot be believed. It must be one inherent in the nature of the transaction itself [*Re Gopeswar Lutt* (1912) 16 C. W. N. 265 ; 39 C., 245]. Thus where the suspicion had reference to the fact that on the morning when the will was said to have been made, the deceased was in an unconscious state and unable either to sign the will or to understand what he was doing, it was held that the rule in *Tyrrel v. Painton* [(1894) P. 151], and the other cases noted above did not apply [*Shamu Charan Kundu v. Khetromoni Dasi*, I. L. R. 27 C., 521 ; 4 C. W. N. 501 ; 2 Bom. L. R. 568 ; L. R. 27 I. A. 10](a).

(j) **Where knowledge and approval of contents by the testator may be presumed.**—“Generally speaking, where there is proof of signature and nothing suspicious, everything else is implied till the contrary is proved ; and evidence of the will having been read over to the testator, or of instructions having been given, is not necessary [*Billinghurst v. Vicker*, 1 Phillim, 187, 191 ; *Goose v. Brown*, 1 Curt. 707] ; for when an instrument has been executed by a competent person, it must be presumed that the party so executing knew the contents and the effect of the instrument, and that he intended to give that effect to it [*Fawcett v. Jones*, 3 Phill. 476 ; *Wheeler v. Alderson*, 3 Hagg 587 ; *Browning v. Budd*, 6 Moo. P. C. 435]. That is to say, in the absence of circumstances exciting suspicion, all fair presumptions may be made in favour of validity of the will, including knowledge and approval of the contents of the will by the testator. [*Ibid.*] So, it has been held in the American Courts that he need not be shown ordinarily that the testator actually read the will or that it was read to him [see *Worthington v. Klemm*, 144 Mass. 167 ; *Brick v. Brick*, 17 Stew. 282 ; *Den v. Johnson*, 2 South. 454 ; *Lipphard v. Humphrey* (1909) 209, U. S. 264]. In the majority of cases, however, knowledge and approval must be affirmatively proved, especially where the testator is blind or illiterate [*Den v. Johnson*, *supra* ; see *infra*, “knowledge of a third person”], or very weak [*Day v. Day*, 2 Gr. Ch. 549], or the will is written in a language which the testator does not understand [*Hildreth v. Hildreth*, 51 N. J. Eq. 241].

(a) *Tyrrel v. Painton* (*supra*) lays down that the suspicious circumstances are not confined to any particular class of circumstances, but extend to all circumstances raising suspicion. In *In re Gopeswar Lutt* (*supra*), Sir Lawrence Jenkins, C. J., speaking of *Tyrrel v. Painton* (*supra*) has given a lucid exposition of the law on ‘the point tracing its history with an account of its history. His Lordship purported to declare that *Tyrrel v. Painton* laid down no new principle. It was the effect of the decision in *Barry v. Butlin* [(1838) 2 Moo. P. C. 480] which was laid down by Lord Davey in *Tyrrel v. Painton* in these words:—“The principle is that wherever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it, unless the suspicion is removed.” But this was an well established old principle which was first enunciated by Parke, B. in *Barry v. Butlin* (*supra*) in the following words :—“The rules of law according to which cases of this nature are to be decided do not admit of any dispute. These rules are two : The first, the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.”

Sir L. Jenkins continued—“The suspicion to which allusion is made must, I think, be ever inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction” (I. L. R. 39 C., 252, 253).

As a general rule, in the absence of fraud approval follows knowledge of the contents, however obtained [See *Collins v. Elstone* (1893), P. 1; *Beamish v. Beamish* (1894) 1 Ir. 7].

(ja) **Where knowledge of a third person is sufficient.**—Cases are not wanting where knowledge of a third person has been held to be equivalent to that of the testator. So, it has been held that a testator may, if he likes, authorize another person to make a will for him, and say, “I do not know what you have put down, but I am quite ready to execute it,” and such a will would be admitted to probate [*Cunliffe v. Cross*, 3 Sw. and Tr. 38]. Similarly if a testator has given instructions for his will and it is prepared in accordance with them, but illness prevents him, at the time of executing the will from recollecting anything beyond the fact of his having given instructions, but he believes that the will he is executing is in accordance with those instructions, this limited capacity is sufficient to render the will valid. This is so, although at the time of execution he had no longer the capacity to recollect and understand either the instructions he had previously given, or even each clause inserted in the will, if it had been put to him. [*Parker v. Felgate*, 8 P. D. 171; approved in *Perera v. Perera*, (1901) A. C. 254, and followed in *Kusum Kumari Dasi v. Satishendra Nath Bose*, 13 C. W. N. 1129; *Aulia Bibi v. Ala-ud-din* (1906) 3 A. L. J. 519]. See *ante*, sec. 46 (S). §

In *Parker v. Felgate* (*supra*), Sir J. Hannen laid down the law in these words: “If a person has given instructions to a solicitor to make a will and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far—“I gave my solicitor instructions to prepare a will making certain disposition of my property: I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.” The law as laid down here, has been followed as noted above, in this country in two cases, one in the Calcutta High Court and the other in the Allahabad High Court (a).

In support of the above view Sir E. V. Williams says: “It is surely a somewhat harsh construction of the law that a man shall not be allowed to confide in his friend or solicitor, and depute him to draw up his will, and adopt it when so drawn up without ascertaining what the contents of it are” (1).

But that view is opposed to the following: *Hastilow v. Stobie* L. R. 1 P. and D. 64; I. L. R. 21 C. 279; *Cleare v. Cleare*, *Ibid*, 655; *Sutton v. Sadler* 3 C. B. N. S. 88, 99; I. L. R. 21 C. 279; *Karunaratne v. Ferdinandus* (1902) A. C. 405, 413.

(a) We venture to submit in this connection that the law which is good in England is not always good in India. Even in England what is good now was not good in the 16th or 17th century. As regards will-making the practice which prevailed in that country in the 16th century, prevails, generally speaking, in this country at the present day (see Preface Touchstone). The rules, therefore, under which knowledge and approval of contents of will are presumed in England, ought not to be adopted in this country in an off-hand way.

In justification of this remark it is further submitted that such presumptions are not consistent with the intention of the Legislature which is clearly apparent from the provisions of section 269, Indian Succession Act and section 90 of this Act. These two sections unmistakably show how cautiously the Legislature proceeds in introducing the rules of English law among the natives of this country, even at the sacrifice of the fundamental principles of the law of Wills in relation to the powers of an executor.

(1) Wms. 25th, a (e), 10th Edn.

(k) **Previous intention, weight of.**—Previous intention deliberately formed while in the vigor of health, or deliberate acts which clearly manifest such intention, are of considerable weight as evidence in support of the execution of will [see *Nilmoney Sing Deo v. Umanath Mookerji*, I. L. R. 10 C., 19; *Woomesh Chandra Biswas v. Rashmohini Dasi*, I. L. R. 21 C., 270; *Rashmohini Dasi v. Woomesh Chandra Biswas*, I. L. R. 25 C., 824 P. C.; 2 C. W. N. 321; *Romesh Chandra Mukerji v. Rajani Kanta Mukerji*, I. L. R. 21 C., 1; *Sayad Muhammad v. Fatteh Muhammad*, I. L. R. 21 C., 324 P. C.]. It follows that evidence as regards matter that transpire between the first inception of the idea of making a will and of the final drafting of it is of great importance in deciding its genuineness [*Kunapareddi Venkamni v. Kunapareddi Ramaya* (1910) 1 M. W. N. 131]. In *Rashmohini Dasi v. Woomesh Chandra Biswas* (*supra*) no previous intention of making a will was shown; but on the other hand, though the will was short and simple, it appeared that the making of it was from first to last the doing of the manager and trusted adviser of the alleged testator. Their Lordships of the Judicial Committee, accordingly, refused probate, and *held*, that this case was unlike a case in which the testator executes a will for which instructions had been given or preparations made while the mind was in vigor.

(l) **Acquiescence in the provisions of the will, value of.**—Long continued acts of acquiescence in the provisions of the will which was acted upon and recognized by the whole family of the testator, will raise a strong presumption in favour of the will, such as would be almost sufficient to establish its genuineness. Thus where a Hindu by his will gave his wife permission to adopt a son, and a son was accordingly adopted with great publicity, and for 27 years that will was, with certain exceptions, acted upon and recognized by the whole of the family, their Lordships of the Privy Council held that the will was proved [*Rajendra Nath Halder v. Jogendra Nath Banerjee*, 14 Moo. I. A. 67; 7 B. L. R. 216; 15 W. R. P. C. 41; see *Gangamoyi Debi v. Troiluckya Nath Chowdhury*, 10 C. W. N. 522; 33 C., 537; 3 C. L. J. 349; 16 M. L. J. 161; 8 Bom. L. R. 357; L. R. 33 I. A. 60; *Narasimha Appa Row v. Rangayya Appa Row* (1905) 16 M. L. J. 178, 209-225; see *Umrao Singh v. Lachman Singh* (1911) 33 A., 344, P. C. 13 C. L. J. 519].

(m) **Facts in favour of execution.**—The following facts are also regarded as very strong evidence in favour of execution:—

- (i) The rationality, or the reasonable nature of the provisions of the will. In *Jagrani Koer v. Durga Pershad* [(1913) 18 C. W. N. 521; I. L. R. 36 A., 93, P. C.]; their Lordships of the Privy Council said, that where the will is “in every respect a natural will, and in accord with his feelings and tenor of life and its execution is proved by anything like reasonable evidence, the presumptions of law are in favour of its being maintained.” They added that, “in the case of a will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those concerns which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tinged with impropriety;” [*Bama Soondari Debi v. Tara Soondari Debi*, I. L. R. 19 C., 65; *Mounappa v. Shioram*, 9 Bom. L. R. 72 J.; *Jagrani Koer v. Durga Pershad*, 18 C. W. N. 521].

- (ii) The circumstance that the person propounding the will derives no advantage under it [*Romesh Chunder Mookerjee v. Rajani Kant Mukerjee*, 1. L. R. 21 C., 1 at 7, 8].
- (iii) The fact that soon after the execution of the will, it was publicly exhibited in Court, and submitted to some investigation and proof, and was proved, though *ex parte* [*Soorendra Nath Roy v. Hurroomonce Burmonee*, 10 W. R. P. C. 35; 1 B. L. R. P. C. 26; 12 Moo. I. A. 81].

(n) **Arbitration.**—The *factum* of execution should not be referred to arbitration [*Ghellabhai v. Nundubai*, 1. L. R. 21 B., 335]. So probate cannot be granted merely on the consent of parties, that is, unless the will is proved in either of the two forms—Common form or Solemn form [*Monmohini Guha v. Bangachandra Das*, 31 C., 357; 8 C. W. N. 197].

It has been held in *Kunja Lal Chowdhury v. Kailash Chandra Chowdhury* (1910) 14 C. W. N. 1068 that probate in Common form (if it may be so called) may be granted in a contentious proceeding, in consequence of a compromise between the parties resulting in the withdrawal of opposition and rendering the case an *ex parte* one. It must not be understood, however, that the compromise precludes the necessity of adducing evidence in support of the will [see *Monmohini Guha v. Bangachandra Das*, 31 C., 357; 8 C. W. N. 197].

See sec. 55 (P), § 6, *ante*.

(o) **Declaration by testator.**—Declarations by a testator that he duly executed his will, are not admissible as evidence of its execution [*Atkinson v. Morris* (1897) P. 40; *Eyre v. Eyre* (1903) P. 131; *In re Repley*, 1 Sw. and Tr. 68]. But in cases to which the Hindu Wills Act does not apply, such declarations are admissible under section 11 of the Indian Evidence Act (I of 1872) [*Nana v. Shanker*, 3 Bom. L. R. 465]. Whether declarations of a testator as to the contents of his will which is not forthcoming, made after its execution, are admissible to prove its contents, is a question which is still unsettled (1). But they are admissible where the question is of fraud or testamentary capacity [*Doe v. Hardey* (1836) 1 Moo. and Rob. 525; *Sutton v. Sadler* (1857) 3 C. B. N. S. 99] (3). See sec. 62 (S) (2), *ante*, p. 154.

(oa). **Sound mind, evidence of.**—See sec. 46 (S) *supra*.

(p) **Will thirty years old.**—A will thirty years old, if from proper custody, is to be presumed to be genuine under section 90 of the Indian Evidence Act (I of 1872) [*Khetter Chandra Mookerjee v. Khetterpaul Sreetiratna*, 6 C. L. R. 199; *Narasimha Appa Rao v. Rangayya Appa Rao* (1905) 16 M. L. J. 178, 209-225; *Man v. Ricketts* (1844) 7 Beav. 93]. But the greatest possible care would have to be exercised in applying this presumption, "as only in the case of a most satisfactory explanation of the delay would a Court be justified in admitting to probate a will thirty years old." See *Gauhar Bibi v. Gherlam Muhammad*, 10 Punj. L. R. 295. (a)

(a) In England, before the Land Transfer Act, 1897 (60 and 61 Vict. c. 65) was passed, wills or real property were not required to be probated (subject to certain exceptions), so that, generally speaking, such wills were themselves evidence, and this being so, 30 years' presumption was applicable to them (3). The ruling in *Khetterchandra Mookerjee v.*

(1) Wms. 264, 10th Edn.

(2) Wms. 263, 10th Edn.

(3) J. Wms. Wills 39.

The attesting witnesses are presumed to be dead after 30 years [*Doe d. Ashburnham* (Lord) v. *Michael* (1851) 15 Jur. 677].

In England before the Land Transfer Act 1924 (60-61 vict Ch. 65) was passed wills of real property did not require to be proved (subject to certain exceptions). So that generally speaking such wills, being so thirty years presumption was applicable to them (1). The ruling in *Khetterpul Sreetiratna*, (*supra*), was evidently founded upon this practice of the Courts in England. Now, however, the probate being the only legal evidence of will, it is doubtful whether such presumption may be validly raised. Further, the will in both *Khetter Mookerjee's* and *Appa Rao's* case, was executed before the Hindu Wills Act was passed so that its provisions did not apply to them.

But sec § 87 (pp. 93-94) of Justice Taylor's Law of Evidence (10th ed.) where it is laid down that the presumption conclusively applies to wills, and it is not affected by proof that the witnesses are living, or even, present in Court; nor by showing that the testator died within the 30 years. The age of the will is reckoned from the date of its execution [*Man v. Rickets*, *supra*].

(g) **Date of will, value of.**—The date of the will may be absent altogether, or it may be imperfect. But this will not affect the genuineness of the will if such absence or imperfection can be satisfactorily explained by evidence. [See *Anwar Hossain v. Secretary of State for India*, 31 C. 885; 8 C. W. N. 821]. The date of a will is important only in relation to the existence or otherwise of any later will (2). See *ante* Sec. 50 (S), § 14.

(r) **Adequate evidence.**—In an ordinary case, evidence which is "precise enough on the main points of execution and signature, and exhibits no signal discrepancies," is adequate [*Soorendra Nath Roy v. Huroomonee Burmonee*, 10 W. R. P. C. 35; 1 B. L. R. P. C. 26; 12 Moo. I. A. 81]. Onus of proof as to capacity comparison of signatures, duty of appellate court, see *Susil Kumar Banerji v. Apsari Debi*, 19 C. W. Notes 827.

(s) **Where testator blind.**—Where the testator is blind, it must be proved that the contents of the will were known to the deceased. His execution or other acknowledgment of the will is not sufficient [*Barton v. Robins*, 3 Phillim, 455, note (b)]. And the same rule applies where from want of education, or from bodily affliction, he is unable to read, or where the capacity of the testator is doubtful, or the instrument is inofficious [*Ibid*, note (b)] (3). See "Blind" p. 65, *ante*. Onus of proof as to sound disposing mind on petition *Dwijendra Nath Pakrasi v. Golaknath Sarkar Pakrasi*, 21 C. L. J. 287.

(t) **Proof of interlineation or interpolation.**—The signature or initials of the testator and the two witnesses, are sufficient to prove an interlineation or interpolation. [*In bonis Blewitt*, 5 P. D. 116] (4).

See sec. 58 (S), *ante*.

(u) **Will in duplicate, proof of.**—Where the will is in duplicate, one part only need be proved. But the executor will be called upon to produce the other part. If the other part is not forthcoming, its absence will have to be satisfactorily accounted for (5).

(1) J. Wm. Wills 39.

(2) See Tr. and Coote 83.

(3) Wms. 356; Tr. and Coote 86.

(4) Tr. and Coote 88; Bro. P. P. 220; Theob. 30.

(5) Tr. and Coote 51; Bro. P. P. 215.

(v) **How evidence to be recorded.**—Having regard to the provisions of section 83 (P) *post*, it would appear that in all cases evidence is to be recorded under section 182 of the Code of Civil Procedure (Act XIV of 1882) [see *Saroda Soondaree Dassia v. Muddan Mohun Shaha*, 24 W. R. 162].

(w) **Delay in propounding will, effect of.**—Although the law of limitation does not apply, lapse of time is a circumstance to be taken into consideration in ascertaining the genuineness of the will. Delay in making the application should, therefore, be explained [*Ganamuthu Upadesi v. Vana Kailpillai* (1893) I. L. R. 17 M., 379].

(x) **Improbability.**—In order to prevail against strong, clear and consistent evidence in support of a will, “an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility” [*Chotey Narain Singh v. Ratan Koer*, I. L. R. 22 C., 519, at 531; L. R. 22 I. A. at 23,—*per* Lord Watson].

(x)a. **Attestation by testator's servants and dependants.**—That a will is invalid, or not duly executed, because it is attested by the testator's own servants and dependants, “is a proposition which verges too closely on the absurd to be seriously entertained. There may be cases in which attestation by servants only is an important element to be taken into account in considering whether a will has been validly executed—cases, for example, in which there is reasonable ground for suspicion that the will is not the voluntary act of the testator, but has been procured by the undue influence of the members of his household” [Lord Watson in *Choteynarain Singh v. Ratan Koer* (1894) L. R. 22 I. A. 12; I. L. R. 22 C., 519; cited with approval in *Jagrani Koer v. Durga Pershad* (1913) 18 C. W. N. 521; L. R. 41 I. A. 76; 19 C. L. J. 165].

(y) **Evidence of execution cannot be dispensed with under section 177, C. P. Code.**—Where a party being present in Court refuses to answer a question or produce a document, section 177 of the Code of Civil Procedure will not justify the Court in dispensing with the evidence of the execution of a will [*Ravji Ranchod Naik v. Vishnu Ranchod Naik*, I. L. R. 9 B., 241].

(z) **When probate may be refused.**—See section 76 (P), § 2 *post*.

5(a) **Where evidence of handwriting of attesting witnesses sufficient.**—There may be circumstances under which mere proof of the handwriting of attesting witnesses may be held sufficient to establish the validity of a will, though no evidence is procurable either of instructions or of the handwriting of the testator [*Anderson v. Welch*, 1 Cas. Temp. Lee, 577] (1).

§ 6. **Questions triable by the Probate Court and rules of practice.**—In determining the question whether probate of the will ought to be granted, it is not within the competency of the Court to enter into any question with reference to the power of the testator to make a disposition of the property of which the will purports to dispose, or the validity of such disposition [*Behary Lal Sandyal v. Juggo Mohan Gossain*, I. L. R. 4 C., 1; 2 C. L. R. 422; *Nanhu Koer v. Somirun Thakur*, 8 C. L. R. 287; *Hormusji Navroji v. Bai Dhanbaiji*, I. L. R. 12 B., 164; *Barat Parshotam Kalu v. Bai Muli*, I. L. R. 18 B., 749; see *Birj Nath De v. Chander Mohan Banerjee*, I. L. R. 19 A., 458; *Abhiram Das v. Gopal Das*, I. L. R. 17 C., 48; *Run Bahadur Singh v.*

Moharanee Rajrup Koer, 4 C. L. R. 498; *Arunmoyi Dasi v. Mohendra Nath Wadador*, 1 L. R. 20 C., 888; *Bal Gangadhar Tilak v. Sokwarbai*, 1 L. R. 26 B., 792; *Chintaman v. Ramchandra* (1910) 12 Bom. L. R. 694; *Nishakant Chatterjee v. Ashutosh Mukerjee* (1912) 17 C. W. N. 613, 792]. The reason is, the grant of probate does not confer upon the executor any title to property which the testator had no right to dispose of, but it only perfects his representative title to the property, which did belong to the testator, and over which he had a disposing power (1) [per Sir Richard Garth, C. J., in *Behary Lal Sandya's* case, *supra*]. And further, the Testamentary Judge can adjust no civil rights to properties between the parties [(1912) *Re Dharamsi Morarji Goculdas*, 14 Bom. L. R. 1031]. See sec. 23 (P), § 6, *ante*.

On the same principle, where an application was made for letters of administration to the estate of a lady who died intestate, objection being raised as to the title of the deceased, it was held that such title need not be finally determined before grant [*Mohun Persad Narayn Singh v. Kishen Kishor Narayn Singh*, 1 L. R. 21 C., 344; see *In the goods of Raghoobur Hazam v. Bahadoor Hazam*, 3 C. W. N. cclxxvii; *Raghu Nath Misser v. Pate Koer*, 6 C. W. N. 345; *Ochavaram Nanabhai Haridas v. Dolatram Jamietram Nanabhai*, 1 L. R. 28 B., 644]. Thus the reasons operating to limit the scope of the inquiry when probate is sought, are equally applicable to a petition for letters of administration.

So the question whether any property is capable of being bequeathed the testator having a right to do so, does not properly arise in probate proceedings [*Moni Debi v. Gouri Pada*, 5 C. L. J. 47 n.; *Durgadas Misra v. Radharaman Misra* (1910) 14 C. W. N. ccxxxii; *Re Dharamsi Morarji Goculdas* (1912) 14 Bom. L. R. 1031].

In suits for proving wills in solemn form the sole question for the determination of the Court is, whether the will or other testamentary paper in dispute, is or is not, in whole or in part, valid as a testamentary instrument. If the will or other paper is found to be valid, probate or letters of administration with the will annexed will be granted to the executor or person entitled to administration, as the case may be (2).

For practical purposes there is little or no difference between probate and letters of administration with will annexed; hence, where there is no executor, the will to which the latter is annexed, must be proved, "as though probate were taken of it by an executor." The expression "*letters of administration with the will annexed*" is used only to distinguish it from *probate* which can be granted only to an executor (3). Thus applications or suits for probate and for letter of administration with the will annexed, are the same in all respects.

§ Grant in case of intestacy.— But applications or suits for simple letters of administration (*i.e.*, without will annexed), are of a different nature. In such cases the sole question for decision is, which of two or more claimants are entitled to a grant of letters of administration. The determination of this question involves "an issue of pedigree or of legitimacy," and of the relative fitness of the several claimants to administer the estate of the deceased. So, the decision may involve the question, "which of the claimants is preferred as

(1) As to what properties are divisible, or over which a testator can exercise his disposing power, see section III *ante*, pp. 35-39.

(2) Tr. and Coote 358.

(3) See Wms. 468, Tr. and Coote 20.

administrator by "the majority of interests?" In England such a suit is technically termed "an interest suit" (1).

Where the parties claiming administration are in equal degree, the usual practice seems to be to follow either of the following rules:—

(a) "That the grant will follow the majority of interests."

(b) "That the grant will be made *priori petenti*," that is, to him who first applies [*Cordeux v. Trasler*, 4 Sw. & Tr. 51] (2).

In *Iredale v. Ford* (1 Sw. & Tr. 305) Sir C. Cresswell observed: "It is difficult to weigh with great exactitude the merits of the respective applicants for a grant, nor is it necessary to do so, because, provided the Court is satisfied that the person it selects is responsible, and is able and willing to give security, the object of the grant is achieved" (3). See secs. 21 (P), § 2 and 46 (P), § 2.

Another rule is that, when several persons apply, the Court will not grant administration to more than three persons, unless there is some special circumstance to induce the Court to depart from this rule, and although the Court should never make a joint grant where it can possibly avoid it [*Warwick v. Greville*, 1 Phill. 126] (4). But see *ante* sec. 200 (S), and also sec. 23 (P), § 2, *ante*, and 92 (P) § 7, *post*.

The legal objections that may be urged against grant of letters of administration, are the following:—

- (a) Badcharacter;
- (b) bankruptcy or insolvency;
- (c) extreme want of health, and
- (d) the applicant's interest being incompatible with the due administration of the estate (5). [*Budd v. Silver* (1813) 2 Phill. 185].

Where such legal objections do not apply, it will be the duty of the Court to look to the benefit of the estate, and to that of the persons interested in the property [see *Warwick v. Greville*, 1 Phill. 125] (6).

6(a) Tendering witnesses for cross examination:—Such practice not warranted by any rule of law, must be disapproved [see *Jaggernath Pershad v. Homman Pershad* (1909) I. L. R. 36 C, 833 P. C.]

§ 7. Citations.—As to what are citations see section 16 (P), *ante*. "Citations" are either *general* or *special*. A *citation* is general, when it calls upon all persons (without naming any particular person) claiming interest to appear or to do what the Court directs; and it is *special* when it is addressed to any particular person or persons by name [see *Kamona Soondery Dasee v. Hurro Lall Shaha*, I. L. R. 8 C., 570, at 575].

It seems the citation contemplated by this section is general citation. Citations, general or special, are issued, as this section provides, calling upon persons claiming to have any interest in the estate of the deceased, to *come and see the proceedings*; such persons (or person) though bound to appear are not

(1) See Tr. and Coote 359.

(2) Bro. pp. 165, 166; Tr. and Coote 267, Wms. 433 (r).

(3) Bro. pp. 166.

(4) Bro. pp. 166, Tr. and Coote 212 Wms. 434.

(5) Coote 199, Tr. and Coote 211, 212, Mort. 326.

(6) Coote 200, Tr. and Coote 212, Wms. 232, Mor. 326 see *ante* sec. 200 (S).

bound to oppose the grant. It cannot be denied, however, that these persons are such "as are interested in contesting the application for probate"; and, as a matter of fact, in practice citation seems to be generally taken out against those only whose interest it is to oppose [see *Shoroshibala Debi v. Anandmoyee Debi*, 12 C.W. N. 6].

It may be remembered that, it is the interest one claims and has in the estate and not the citation, which entitles him to contest the grant. So it has been held that one has no right to enter a *caveat* simply because he had received a special citation [*Re Hurrydass Bonerjee* (1878), I. L. R. 4 C., 87]. See *post* §§ 9—11.

Object of citation (a).—Citations are issued in England in non-contentious as well as contentious matters. Its chief object in the former is to compel all persons having a prior or equal right to a grant to come in and take the grant, or else to lose their right in favour of the applicant. In the latter it is to compel a person to bring in a grant, or to propound a will or to bring a person before the Court to see the proceedings. The person brought before the Court is neither a plaintiff nor a defendant; he is brought only in order that his interest may be bound.

Citations are issued in common form or non-contentious business simply to take a grant and not to oppose a grant—These are not upon interested parties to come and see as this section provides. It is only when a person having a superior (or equal) right to prove the will delays or declines to do so, that a citation is issued upon him (calling upon him) either to take the grant or renounce [sec. 16 (P) *ante*]. Thus common form grants are made "without citing the parties."

Special citation.—When a will is propounded which alters the devolution of property, the District Judge should in the exercise of his discretion, direct special citations to persons whose rights are immediately affected by the will. But the issue of such citations is not imperative so as to make the proceedings substantially defective merely by reason of its absence. [*Nistarini Debya v. Brohmomoyi Debya*, I. L. R. 18 C., 45; *Kamona Soondary Dassee v. Hurro Lal Shaha*, I. L. R. 8 C., 570 *Digambar v. Narayan*, *supra*]. That is, whether general or special it is in the discretion of the Court to issue citation under this section [*Digambar v. Narayan* (1910) 13 Bom. L. R. 38]. Although, therefore, the probate may not be revoked for absence of such citation, it affords a good reason for inquiring into the genuineness of the will [*Digambar v. Narayan*, *supra*].

When the person claiming interest is a minor, the proper course is to serve him with a citation and to have a guardian *ad litem* appointed for him [*Rebells v. Rebells*, 2 C. W. N. 100]. Citation upon the petitioner as guardian representing the minor whose interest is affected by the will, is not a valid citation [*Shoroshibala Debi v. Anandmoyee Debi*, 12 C. W. N. 6]. A citation should issue upon the guardian of the minor also [see *In re Amrita Lal Mullick*, I. L. R. 27 C., 350, where a special citation was ordered to be issued]. All persons whose interest is adversely affected entitled to notice *Dwijendra Nath Pakrasi v. Goloknath Pakrasi*, 21 C. L. J. 287.

(a) Formerly, that is, before the Judicature Act of 1875, 'Citation' was the initiary step in a contentious probate proceeding. But that has been abolished and now every such business is commenced by a *writ of summons*. A *caveat* is still the first step in contentious business, inasmuch as it precedes the *writ of summons*. But a *caveat* does not indicate contention. Proper course when minor is concerned see *Ibid*.

Citation should be issued against an heir-at-law, even if he is already before the Court in another character [*Lister v. Smith*, 3 Sw. & Tr. 53]. So the Court will direct citation against the devisees in an earlier will, in case a later will is propounded (*Ibid*) (1).

Similarly where a party to a suit is before the Court as next-of-kin or legatee being also heir-at-law or devisee under the same will, citation should be issued against him to see the proceedings as heir-at-law or devisee [*Emberley v. Trevanion*, 4 Sw. & Tr. 197] (2).

Where a Parsee died leaving a widow and two daughters by a predeceased wife, and one of such daughters was residing in Africa and the other in Calcutta, and the latter applied for letters of administration, the widow having renounced her claim, citation was dispensed with and the application granted [*In bonis Shapoorjee Framjee Mehta*, 5 C. W. N. cxlvii. See *In bonis Elizabeth Graham*, L. R. 2 P. & D. 385] (3).

§ 8. Citation, High Court rules (Original Side).—When the widow applies for administration, a citation shall issue to the next-of-kin, and when the next-of-kin applies, a citation shall issue to the widow, if any, and another to the next-of-kin next entitled (4).

When a creditor applies, a special citation shall issue to the widow, if any, and next-of kin, provided they shall be resident within the jurisdiction, or have any known agent resident within the jurisdiction, and a general citation shall also issue to all persons interested in the goods of the deceased, and all such citations shall be served personally upon such known agents when they are within the jurisdiction (5). See *supra*, sec. 21 (P), § 3 and 22 (P), § 2.

When a creditor applies, it is necessary that a special citation should be issued to the Administrator-General, who has a preferential right under Act II of 1874, § 15 (6).

§ 9. "Persons claiming to have any interest."—As to what is "interest," and who are "persons claiming to have any interest in the estate of the deceased," see sec. 50 (P), §§ 6, 7, 8 *ante*.

A person who is served upon by citation is bound to appear before the Court, but is not bound to contest a grant, nor is, simply because of such citation, entitled to do so. For, before a person is permitted to contest a will, the party propounding it may, as a matter of right, call upon him to show, that he has sufficient *interest* in the deceased's estate to entitle him to become a party and oppose the grant [*Rahamatulla v. Ramakau*, I. L. R. 17 M., 373]. *Hingston v. Tucker*, 2 Sw. & Tr. 596] (7). "The foundation of title to be party to a probate or administration action is interest" [*Crispin v. Doglioni*, 2 Sw. & Tr. 17; *Kipping v. Ash*, 1 Rob. 270] (8), and the parties contending must be *in eodem gradu*, and in a position to take the grant which they seek to have disallowed to the other [*Atkinson v. Barnard*, 2 Phill. 217] (9).

(1) 14 L. of Eng. 155.

(2) Tr. and Coote 393; Bro. pp. 292.

(3) Tr. and Coote 97.

(4) Belch 309 Rule 743.

(5) *Ibid.* Rule 743.

(6) *Ibid.* 310, Rule 744.

(7) Wms. 342.

(8) See Wms. 342, Bro. pp. 287, Tr. and Coote 361.

(9) Coote 199, Tr. and Coote 211.

§ 10. "Proceedings."—Where the case is contentious, the proceeding shall take the form of a suit, though it is not a suit properly so called. [See *Arunmoyi Dasi v. Mohendra Nath*, I. L. R. 20 C., 888]. But see sec. 83 (P), *post*.

§ 11. "And see the proceedings."—It is not necessary that a person should be a party to a suit in the Court of Probate, in order that he should be bound by its result. It is sufficient for this purpose if he be privy to such suit and knowingly stand by while the contest is going on (see *In re Pitamber Girdhar*, I. L. R. 5 B., 638). Thus the object of citing parties "to come and see the proceedings," is, not only that persons so cited should, for ever, be barred, but that those who, though uncited, are to a certain extent privy to and aware of the suit, shall also be similarly barred from ever reopening the question or putting the executor on proof of the will again [*In re Pitamber Girdhar*, *supra*; *Newell v. Weeks*, 2 Phill. 224; *Saradakant Das v. Gobind Mohan Das* (1910) 12 C. L. J. 91; *Kunja Lal Chowdhury v. Kailash Chandra Chowdhury* (1910), 14 C. W. N. 1068] (1).

§ 12. Pleading.—As a general rule, the rules of pleading laid down in the Code of Civil Procedure (Act XIV of 1882) ought to be followed in all cases in the Court of Probate.

Where, however, there are interlineations, obliterations, erasures, or such other alterations or additions in the will, or where any incorporation is relied upon, a reference to such interlineations, &c., or to the documents said to be incorporated, should be made in the statement of claim, and the party propounding the will should state in clear terms, whether he claims probate with these alterations or additions, or with such documents, included in it (2) See *ante* sec. 46 (S), § 14.

§ 12 (a). Estoppel.—A *caveator* having unsuccessfully assailed the whole will on ground of undue influence, is estopped from subsequently showing that a part only or any particular clause of it had been inserted through undue influence [*Nuzha Uddowla Abbas Hossain Alias Peara Saheb v. Kurutulain Bahadur*, I. L. R. 31 C., 186]. But see *ante* sec. 12 (P), § 2(a).

Where an executor having with full knowledge of all the circumstances bearing on his rights, accepted the office of executor, obtained probate and under its authority collected assets and otherwise so acted as to cause third parties to alter their position, it was held, that he was estopped from impeaching the will setting up in respect of the property dealt with by it any right inconsistent with the dispositions and conditions therein.(3) [*Srinivasa Moorthi v. Venkata Varada Ayengar* (1906) I. L. R. 29 M., 239 at 281; 16 M. L. J. 238;

(1) Tr. and Coote 355; Wms. 342.

(2) Sec. Tr. and Coote 414—418.

(3) F. N. Mr. Bengalow says we have now to call attention to some cases of estoppel akin to those already considered in which however, there is no contract giving to the party estopped the right of possession is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived. The cases referred to are *succession post mortem*, that is estates devolving by testacy or intestacy upon the person taking possession." "Its also a general principle of law, that an executor or administration of property into the possession of which he has been let under the will or letters of administration is like a tenant estopped while he continues in possession from disputing the title of his testator or intestator.

affirmed, in I. L. R. 34 M., 257; 13 Bom. L. R. 520 P. C.; 21 M. L. J. 669; 14 C. L. J. 64; 15 C. W. N. 741. In *Muni Sami Chetty v. Maruthamirai* (1910) 20 M. L. J. 687; 8 M. L. J. 124; 34 M. 211]. In other words, an executor is not at liberty to set up an adverse title to the property which has come to his hands as an executor or trustee until he has obtained a proper discharge from the trust [*Srinivasa Moorthi v. Venkata Varada Ayyangar, supra*]. It is immaterial whether probate has been taken out or not [*Munisami Chetty v. Maruthammal* (1910) 20 M. L. J. 687; I. L. R. 34 M., 211; 8 M. L. T. 124]. See *ante* sec. 50 (P), § 5.

So, one who accepts the benefit of a provision in his favour under a will, is estopped from contesting the validity of the instrument, especially where other persons interested in the disposition of the testator's property have upon the faith of such acceptance so acted that their position cannot be restored. The principle is, one cannot claim both under and against the will [*Utermehle v. Norment*, 197, U. S. 40]. So one who has elected to take a legacy under a will is estopped from setting up a title contrary to its provisions [*Probodh Lal Kundu v. Harish Chandra Dey*, 9 C. W. N. 309]. See sec. 119 (S), *ante* § 4.

It has been held, however, in *Williams v. Evans* [(1911) L. R. 38 I. A. 129 at 136] that where an executor who is also the next-of-kin and who takes out probate with full knowledge of all the facts, is not estopped from contesting the validity of the will.

§ 13. “**And otherwise published.**”—Citations may be published and made known by means of advertisements in newspapers (1). See sec. 16 (P) § 3, *ante*.

See section 82, para 2, of Act XIV, 1882, *i.e.*, the Code of Civil Procedure.

§ 14. **Presumptions.**—See § 5, *supra* and sec. 46 (S), § 15 (3), *ante*.

§ 15. **Onus.**—See *ante* secs. 46 (S) and 48 (S).

186. **70 (P).**
251 (S).—Caveats against the grant of probate or

Caveats against
grant of probate or
administration.

letters of administration may be lodged with the District Judge or a District Delegate; and, immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and, immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had his fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

NOTES AND COMMENTARIES.

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| § 1. | 1. <i>The section.</i> | § 4. | 4. <i>Opposition without caveat.</i> |
| § 2. | 2. <i>Caveat.</i> | § 5. | 5. <i>Stamp duty.</i> |
| § 3. | 3. "Against the grant of probate." | § 6. | 6. <i>Miscellaneous.</i> |

§ 1. **The section.**—This section corresponds with section 251 of the Indian Succession Act, as amended by section 5 of the District Delegates Act (VI of 1881), and section 53 of the Court of Probate Act, 1857 (20 and 21 Vict. C. 77).

§ 2. **Caveat.**—A *caveat* is a warning or caution in writing entered in the Court of Probate, "to stop probates and administrations from being granted without the knowledge of the party that enters it."

A *caveat* is of such force and validity that if any probate or letters of administration be granted pending such *caveat* the same is void (1).

Thus it is evident that, any person having an interest in the estate of the deceased may by means of a *caveat* prevent a grant from being issued without notice to himself (2). See sec. 50 (P), § 5.

A *caveat*, however, is not required to be entered merely for the purpose of disputing a will. It may be entered for the purpose of supporting it [*Ingram v. Strong*, 2 Phill. 315]; for, the *caveator*, being entitled to notice or 'warning' before a grant can issue, has the opportunity of entering an appearance, whereupon he may *oppose* or *support* the grant as he may think proper, having regard to his own interest (a) (3).

It follows, therefore, that the mere entry of a *caveat* does not make a case *contentious* [*Chotalal v. Bai Kabubai*, I. L. R. 22 B., 261].

§ 3. "Against the grant of probate."—The section requires a *caveat* to be lodged "against the grant, &c." It may be questioned whether "grant" includes "issuing." According to Mr. Browne, "where a grant of probate or letters of administration has not yet issued, any person intending to oppose such issuing, does so by entering a *caveat*" (4).—Do these words indicate that a *caveat* is to be entered only where the party entering it desires to oppose the grant, and that a *caveator* is not entitled to support it? If this be so, the mere entry of a *caveat* ought to be held to make a case *contentious*. But it has been held otherwise [*Chotalal v. Bai Kabubai*, *supra*].

§ 4. **Opposition without caveat.**—See sec. 71 (P), § 3.

(a) In England the person whose application for a grant has been stopped by the *caveator*, is compelled to warn the *caveat*, as it is called, and in the warning to disclose his name and his interest in the estate of the deceased, and the *caveator*, in his appearance to the warning, makes a similar disclosure. In this way the parties are in possession of facts which may lead either of them, should their interests conflict, to institute an action against the other for the purpose of establishing a claim to the grant. Should there be no conflict, it is open to the *caveator* to support the applicant's claim [*Ingram v. Strong* (1815) 2 Phill. 315] (5).

(1) Wms. 587-88; Tr. and Coote 324.

(2) Tr. and Coote 251.

(3) Bro. P. P. 301.

(4) Bro. P. P. 300.

(5) Mortimer 515.

§ 5. Stamp duty.—The stamp fee chargeable on a *caveat* is Rs. 5 (1).

§ 6. Miscellaneous.—In England, a *caveat* remains in force for six months only. There is nothing in this Act providing any such period.

187. 71 (P).
252 (S).—The caveat shall be to the following effect:—

Form of Caveat.

“Let nothing be done in the matter of the estate of A. B., late of _____, deceased who died on the _____ day of _____ at _____, without notice to C. D. of _____”

NOTES AND COMMENTARIES.

§ 1. *Who may be a caveator.*

§ 2. *What the form implies.*

§ 3. *Time of entering caveat.*

§ 1. Who may be a caveator.—The *caveator* may be either the party having interest, or his proctor, attorney or vakeel (2).

§ 2. What the form implies.—“The form of the *caveat* * * * would seem to show that the person who enters a *caveat* admits that the particular property forms a portion of the estate of the testator, but objects either to the execution of the will or to the proposed manner of dealing with any portion of the estate” [Prinsep and Ghosh JJ. in *Abhiram Dass v. Gopal Dass*, I. L. R. 17 C., 48 at 52].

§ 3. Time of entering caveat.—There is nothing in this Act, or in the Indian Succession Act, as to the time when a *caveat* may be entered, that is, whether before or after any application has been made for probate or letters of administration. As, however, from the above form it appears that a *caveat* has reference to “the matter of the estate” and not to that of any *application*, and as, it is to be presumed that the *caveator* has no knowledge of the application, if any, that might have been made, it seems reasonable that a *caveat* may be entered at any time after the death of the deceased whether any application has or has not been made, and before any probate or administration has actually been granted and issued. The language of sec. 70 (P), *supra*, seems also to support this view. [See the facts in *Grey v. Charushila* (1910) I. L. R. 38 C., 53], and also *Jarat Kumari Dassi v. Bisseswar Dutt* (1911) I. L. R. 39 C., 245, at 249], where the *caveat* had been entered before the application for probate was made.

The object of a *caveat* being, to stop probates and administrations from being granted without the knowledge of the *caveator*, it seems further reasonable that, where the *caveator* has already been served with a notice under section 69 (P), *supra*, it is not necessary that he should enter a *caveat* at all for being again served with a similar notice, even where he intends to oppose the grant.

(1) Court Fees Act (VII of 1870), Schedule II, Art. 12.

(2) Stokes, 164.

But see *Tara Chand Chuckerbutty v. Deb Nath Roy* (10 C. L. R. 550), where the party opposing the grant, was directed by the Calcutta High Court to pay the Court-fee stamp required for a *caveat* immediately, no *caveat* having been entered by him in the original Court, their Lordships (McDonell and Field, JJ.) thereby indicating that there can be no opposition without a *caveat*. It is, however, satisfactory to note that the Punjab Chief Court agrees with the view that under secs. 70 (P) and 72 (P) one can oppose the grant of probate or letters without first lodging a *caveat* [*Bhazan Das v. Mohant Ramsaran Dar* (1910) 5 Punj. W. R. 113].

188. **72 (P)**
253 (s)

After entry of caveat, no proceeding taken on petition until after notice to caveator.

—No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made, or notice thereof has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court shall think reasonable.

NOTES AND COMMENTARIES.

In England, this notice is called "warning," from the fact that it is a notice given to the *caveator* warning him within a certain time (generally six days) to enter an appearance and to set forth his interest, with a further warning that in default of his doing so, the Court will proceed to do every thing in his absence (1).

So under the rules of the High Court in Calcutta, a *caveat* must be supported by an affidavit within eight days, stating the right and interest of the *caveator* and the grounds of objection to the application. Unless such affidavit is so filed, the *caveat* will not prevent the granting of probate or letters of administration; and no affidavit can be filed after the expiration of eight days without the special leave of the Court or a Judge thereof (2). A similar practice prevails in the Bombay High Court [see *Chotalal v. Bai Kabubai*, I. L. R. 22 B., 261].

In the Original Side of the Calcutta High Court a *caveat* may be set down for argument in order to determine the right of the *caveator* (3).

In England, the Court is so jealous upon the subject of a grant made after a *caveat* is entered, that in a case where letters of administration with the will annexed were granted after a *caveat* had expired, without notice to the adverse party, it was held that the grant was surreptitiously obtained, and it was revoked [*Trimleston v. Trimleston*, 3 Hagg. 243] (4).

(1) Bro. P. P. 304.

(2) Bech. 316, Rule 750.

(3) *Ibid* Rule 689.

(4) Bro. P. P. 307; Tr. and Coote 198, 202; Wms. 387; Walker and Elg. 110.

189. **73 (P)**.
253 A (S)

District Delegate
when not to grant
probate or adminis-
tration.

—A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

Explanation.—By “contention” is understood the appearance of any one in person, or by his recognized agent or by a pleader duly appointed to act on his behalf, to oppose the proceeding. See sec. 83 (P), *post*.

NOTES AND COMMENTARIES.

§ 1. *The Section.*

(a) *Contention, meaning of.*

§ 2. *Grounds of Contention.*

§ 1. **The section.**—This section corresponds with section 253 A of the Indian Succession Act to which it was added by section 7 of the District Delegates Act (VI of 1881).

Contention, meaning of.—Contention means contest. That is, if the nature of the suit or proceeding is such that no contest is involved, the suit or proceeding is non-contentious. But if a contest is involved it is contentious [*Annamalai Chettiar v. Malayandi Appaya Naik*, I. L. R. 29 M., 426, per Sir Arnold White, C. J.]. In the same case Sir Subramania Ayyar, J., said: “The contentious jurisdiction is obviously that by invoking which a party having a difference with another puts the law in motion as against his adversary, in contradistinction to jurisdiction to be resorted to in matters which *ex-hypothesi* admit of no opposition.” In *Upendra Chandra Singh v. Mohri Lal Marwari* [I. L. R. 31 C. 745] it was held that, to constitute a suit ‘contentious’, it must be a suit, which upon the face of the proceedings would appear to involve some contention as to the right of one or other of the parties in the subject-matter of such suit (per Ghose and Pargiter, JJ., reference being made to some previous cases on the point). It may be noted that these cases were decided with reference to the meaning of the word ‘contentious’ in section 52 of Act IV of 1882 (Transfer of Property Act)—a word which is used there in the sense in which it is used in this Act [see *Annamalai Chettiar v. Malayandi Appaya Naik*, *supra*; Dr. Ghose on Mortgage, 794, 3rd Ed.]. See *post*, sec. 83 (P).

But the words “appearance * * * to oppose the proceeding,” have been interpreted to mean not only making appearance to oppose, but also filing written statement in the moffasil and affidavit in the High Court in support of the *aveat* [see *Chotalal Chunilal v. Bai Kabubai*, 22 B., 261; *Pakiam Pillai v. Funasi Fernand*, 19 M., 456; *Surendra Nath Gupta v. Kasimoni Debi*, 1 C. L. J. 49n]. Thus although a proceeding may be ‘contentious’ under sec. 52, Act IV, 1882, in the absence of any appearance to oppose, as held in *Fatyas Husain v. Munshi Prag Narain* [L. R. 34 I. A., 102; I. L. R. 29 A., 339; 11 C. W. N. 561], it is clear that, no proceeding under this Act is contentious before any such appearance is made, 5 C. L. J. 553; 17 M. L. J. 263; 9 Bom. L. R. 656; 4 A. L. J. 329.

§ 2. Grounds of contention.—*Contention* may be on various grounds, such as incapacity, undue influence, informal execution, subsequent revocation, &c., &c. (1). But a caveator, having unsuccessfully assailed the whole will on ground of undue influence can not subsequently show that a part or any particular clause of it had been inserted through undue influence (*Nuzhatuddowla Abbas Hossain v. Mirzakurratulain*, I. L. R. 31, C. 186). See sec. 69 (P), § 2, and § 12a p. 767, *ante*.

190. 74 (P).
253 B (s)

Power to transmit statement to District Judge in doubtful cases where no contention.

—In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

This is with slight alterations, section 50 of the "Court of Probate Act, 1857" (20 and 21 Vict. C. 77). It corresponds with section 253 B of the Indian Succession Act to which it was added by section 7 of the District Delegates Act of 1881. Section 50 of the Court of Probate Act runs as follows:—

"In every case where it appears to a District Registrar that it is doubtful whether the probate or letters of administration which may be applied for should or should not be granted, or where any question arises in relation to the grant or application for the grant, of any probate or administration, the District Registrar may transmit a statement of the matter in question to the Registrars of the Court of Probate, who shall obtain the directions of the Judge in relation thereto, and the Judge may direct the District Registrar to proceed in the matter of the application according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Registrar in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Court of Probate through its principal registry, or, if the case be within its jurisdiction, to a Country Court."

191. **75 (P)**.—In every case in which there is contention or the district Delegate is of opinion that the probate or letters of administration should be refused in his court, the petition with any documents that may have been filed therewith shall be returned to the person by whom, the application was made in order that the same may be presented to the District Judge; unless the District Delegate thinks it necessary for the purpose of Justice to impound the same which he is hereby authorized to do and in that case the same shall be sent by him to the District Judge.

This is section C. 253 (c) of the Indian succession Act to which it was added by section 7 of the District Delegates Act of 1881.

192. **76 (P)**.—Whenever it appears to the Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of the court in manner following :—

Procedure, where there is contention or district Delegate thinks probate or letters of administration should be refused in this court.

“I,——, Judge of the District of——, [or Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)] hereby make known that on the——day of——in the year——the last will of——, late of——a copy whereof, is hereunto annexed was proved and registered before me and that administration of the property and credits of the said deceased, and in any way concerning his will, was granted to——, the executor in the said will named, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint and also to render to this

Grant of Probate to be under seal of Court.

Form of grant.

Court, a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint.

The——day of——, 18——."

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 6. <i>Under-payment of duty.</i> |
| § 2. <i>Should be granted</i> | § 7. <i>Duty in respect of power of appointment.</i> |
| § 3. <i>Probate duty.</i> | § 7(a) <i>Property over which power of appointment in exercised.</i> |
| § 3(a) <i>Debts.</i> | |
| § 4. <i>Duty on Annuity.</i> | |
| § 5. <i>Over-payment of duty.</i> | |

§ 1. **The section.**—This section corresponds with section 254 of the Indian Succession Act, as amended by sections 8 and 9 or the District Delegates Act (VI of 1881) and section 12 of Act VI of 1889.

§ 2. **"Should be granted."**—Where the genuineness of the will is not disputed and the applicant is not legally incompetent, the Court has no discretion to refuse probate on the ground that in its opinion, the applicant is not a fit person to be executor [*Hara Coomar Sirkar v. Doorgamoni Dasi*, I. L. R. 21, C., 195]. Legal incapacity is the only ground on which probate may be refused [See *Pran Nath Ghosh v. Jadu Nath Bhattacharjee*, I. L. R. 20 A., 189].

§ 3. **Probate duty.**—An order for grant of probate or letters of administration cannot be made until the petitioner has filed in Court a valuation of the property, in the form prescribed by Schedule III of the Court Fees Act [Act VII of 1870, as amended by Act XI of 1899, sec. 2] (1), and the Court is satisfied that the fee mentioned in No. II of the first Schedule or that Act, as amended by Act VII of 1889, sec. 13, has been paid. The fee is not necessarily payable at the time of the application for the grant [*In the goods of Aradhoney Dassee*, 5 C. W. N. ccliv; but see *In re Omda Bibee*, I. L. R. 26 C., 407; 3 C. W. N. 392].

The duty is payable on what represents the value of property situate in British India only, that is, such assets as, at the date of the testator's death, are in British India [*In re Abraham*, I. L. R. 21 B., 139]. See *post* sec. 99 (P).

(a) The value of the property in respect of which, probate or letters of administration, are granted is the value of all the property and credits of which, the deceased died possessed of, or entitled to, at the time of his death, diminished by the following [Re H. T. Kerr (1913) 18 C. W. N. 121, 18 C. L. J. 308].

(1) The amount of debts due by the deceased [See *post* sec. 19B Chap. III A. App. D. & App. C. § ch. III annenure B.]

(2) The amount of funeral expenses [Sec. App. C Sch. III Annenure B].

(1) See *ante* sec. 62 (P), and App. 6.

(3) Amount of mortgage incumbrances [See App. C., Annenure B. [*In re Ram Chandra Lakhemji* I. L. R. 1 B. 118. *In re Inns* 8 B. L. R. App. 43 16 W. R. 252].

(4) Property held in trust, not beneficially or with general power to confer a beneficial interest. [App. C. Sch. III. Annenure B].

Under section 19 C., Act VII of 1870 (3) as amended by Act XIII of 1875 Sec. 6 in case of a second grant the fees payable under the first grant, are to be deducted but where the first grant was made free of any charge of duty. Such duty not being payable according to the law, as it then stood the 2nd grant will not be exempted [*In the goods of Malcolm Gasper* 2 C. L. R. 436] where the first grant was made in England and duty paid there on properties situate in India, the second grant in India was not exempted [*In Gladstone* I. L. R. 1 6. 168]. See *Infra*.

Duty being payable only when the value of the property exceeds one thousand rupees (1) in a case where, the property had not been reduced into possession by the testator and he had a mere right of suit in respect to it, it was held, that the executor might declare the value as not exceeding that amount. In other words, where property is under litigation, the value may be fixed at less than Rs. 1000. [*In the goods of Abdul Aziz* I. L. R. 23 Cal. 577].

In a similar case [*Saldanha v. Secretary of state for India* I. L. R. 24 M. 241] although the value of the property was allowed to be fixed at less than Rs. 1000 the Court observed that the mere fact of an item of property, being the subject of litigation does not itself prevent the value of the property from being assessed for the purpose of stamp duty on an application of probate.

The duty is to be paid according to the following scale :—

When the amount or value of the property in respect of which, the grant of probate or letter is made exceeds one thousand rupees, but does not exceed ten thousands rupees.	} Two per centum on such amount or value.
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When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees.	} Two and one half per centum on such amount or value.
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When such amount or value exceeds fifty thousand rupees.	} Three per centum on such amount or value.
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Provided that when after the grant of certificate under the succession certificate Act 1889 or under the Regulation of Bombay Code VIII of 1827 in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.

Nothing in this Act, shall apply to any probate letters of administration or certificate, in respect of which, the fee payable under the law for the time being in force has been paid, prior to the commencement of this Act, but which have not been issued. See Court fees Act 1870 Schedule I as amended by the succession certificate Act 1889 and Act 7 of 1910.

Exemption of certain probate letters of administration and certificates.

§ 3(a) Debts. But no allowance shall be made for debts incurred by the deceased or incumbrances created by a disposition made by the deceased unless such debts or incumbrances were incurred or created bonafide for full consideration in money or money's worth, wholly for the deceased's own use and benefit, not for any debt in respect where of there is a right to re-imbursement from any other estate or person, unless such re-imbursement can not be obtained (1).

Debts for the payment of which, a return of duty, paid there on, is allowed under section 19 B. D. (Post. App. D.) mean only such debts as of themselves and in their own nature and character, are payable out of the estate and have no relation to any which a testator may make in his will for their payment. [*Percival v. The Queen* 3 H. and C. 217].

The uncertainty of recovering a debt due to the estate of a deceased person, is not a sufficient ground for reducing the fee [In the goods of Ram Chandra Ghose I. L. R. 24 C. 567. *In the goods of Beake* 13 B. L. R. App. 24].

§ Exemption of Deposit in Saving Bank—Section 8 of the Government Saving Banks Act (V. of 1873) exempts a deposit of Rs. 1000 from duty, though the value of the property of the deceased depositor exceeds Rs. 1000. That section enacts "where the amount of deposit, belonging to the estate of a deceased depositor does not exceed Rs. 1000 such amount shall be excluded in computing the fee chargeable under the Court fees Act 1870 on the probate or letters of administration or certificate if any granted in respect of his property. Provided that the person claiming such probate or letters or certificate shall exhibit to the Court authorized to grant the same, a certificate of the amount of the deposit in any government Savings Bank, belonging to the estate of the deceased. Such certificate shall be signed by the secretary of such Bank and the court shall receive it as evidence of the said amount.

§ Locality of assets :—Where the head office of partnership business is in London, probate duty is not payable on the value of the share of the deceased in the Indian Branch of the firm or of the properties of the firm, situated in British India at his death. [*In the goods of Sassoon* I. L. R. 21 B. 673].

In such cases, the question to be determined is the local situation of the assets. The share of a deceased partner in a business is situated where the business is carried on at the time of his death [*Commissioner of stamp duties v. Salting* (1907) A. C. 449 *Saidlay v. The Lord Advocate* (1890) 15 A. C. 468 *Beaver v. The Master in equity* (1895) H. C. 251. *In re Ewing* 6 P. D. 23].

The latest English case on the question of locality of asset is *Lord Sudeley v. Attorney General* (1897 A. C. 11) In this case the master of the Rolls observed "It is not every asset of the estate that is to be valued for duty but only such of the assets of the estate, as were at the date of the death of the testator locally within the jurisdiction of the authority which grants the probate. * * *

The distinction between assets of the estate which are liable to probate duty and assets of the estate which are not liable to probate only depends upon the locality of the assets at the time of the testator's death.

In regard to cases where property is in India and also in England or any foreign country Mr. Justice Strachey late of the Bombay High Court says :—

(1) *Ibid* Finance Act 57—58 vict. C. 30, Sec. 7.

"The practice in cases where a testator leaves property both in British India and England, has always been to levy probate duty here only upon the Indian assets and this can only be on the principle established by the English decision".

[*In re Abraham*, I. L. R. 21 Bom 139 at 151.] But see in the goods of *Murch*, I. L. R. 4 C. 725.

Trust Property:—Probates and letters of administration are valid as to trust property, although not covered by the court fee paid thereon. This applies to property purchased by members of a family governed by the Mitakshara [See *In the goods of Pakurmull Agurwallah* I. L. R. 23 C. 980 I. C. W. N. 31. *In Bonis Brindaban Ghose* 11 B. L. R. App. 39 19 W. R. 30. *In Bonis Joymoni Dasee* 1 B. L. R. 184.]

In the Collector of Ahmedabad v. Sarv Chand Laaule Chand I. L. R. 27 B. 140, it was held that the exemption of trust estates from the payment of advalorem court fee, was conditional on the circumstance that there had been a previous grant of probate or letters of administration on which a court fee had been paid. But it seems to be now settled that this exemption is not conditional on any such circumstance but it must be referable to the character of property and not to the procedure adopted [*Collector of Kaira v. Chunilal* I. L. R. 29 B. 161 S. C. 6 Bom. L. R. 652.]

In a Mitakshara family of father and son holding joint ancestral property, the father died, the son applied for letters of administration. It was held letters could be granted in such case. As to the duty payable, it was held that a Hindu father can not be said to hold his own share of the joint property "in trust not beneficially," though he may be said to hold his son's share in that way, so that the son must pay advalorem duty on so much of the property as was not properly held in trust, not beneficially or with general power to confer a beneficial interest i.e. on the father's share in the property [*In re Dasu Manawala Chetty* (1909) 6 M. L. T. 286 F. B., I. L. R. 33 M. 93, 19 M. & L. J. 591.]

See *In re Brindaban Ghose* (1893) 11 B. L. R. App. 39 S. C. 19 W. R. 230. *Re Foreschman* (1883) I. L. R. 20 C. 575.

4. Duty of Annuity:—For the purpose of determining the fee to be paid on an annuity, the word value in the court fees Act (Act VII of 1870) Sch I Cl. 11 must be taken to mean the market value of the annuity and not ten times the amount of a yearly payment. [*In re Ram Chandra Lakshmanji* I. L. R. 1 B. 118.]

The exemption from liability to pay court fees provided by sec. 10 Cl. VIII. under Sch I No. 11 of the court fees Act, applies only in cases where the gross value (as distinguished from net value) does not exceed 1000 rupees (the collector *Maldah v. Nirode Kamini Dasi* (1912) 17 C.W.N. 21. This case doubted in, *In re T. Kerr* (1913) 186 W. N. 121.

Where property is subject to the payment of an annuity for life, the duty ought to be levied upon the value of the property less the capitalized value of the annuity. [*In the goods of Rushton* I. L. R. 36, 736] see ante see 162 (S) notes. Market value is such value at the time of the deceased's death (1) 1724, 10th Edn.

§ 5. Over payment of duty.—As to relief where over payment has been made See Sections 19 A., 19 B of Act VII of 1870 (see *ante* Sec. 62 (p) & App. c.) as amended by Act XIII of 1875 Sec. 6 (App. B. Chap III A.)

§ 6. Under-payment of duty :—As to remedy where under-payment has been made, see sections 19 E to 19 G of the above mentioned Act (App. B.)

§ 7. Duty in respect of power of appointment :—Where an executor dies, after appointing an executor in the exercise of a general power of appointment, the latter executor is liable to pay probate duty on the fund or interest in respect of which the power of appointment is exercised [*In re Lakshmi Narayan Ammal* I. L. R. 25 M 515] The grant to the second executor is not like grant within the meaning of sec. 19 c. Act VII of 1870 (*Ibid*). But *in re Lakshmi Narayan Ammal* is opposed to the provisions of Annexure B in schedule III of the court fees Act as amended by Act XI of 1899. That Annexure provides that “property held in trust not beneficially or with general power to confer beneficial interest,” is not subject to duty (App. C. Sch III). Evidently therefore in the said case under consideration, the court’s attention was not drawn to the exemption clauses of Annexure B.

§ 7a. Property over which power of appointment is exercised :—Such property has been held in several cases to be trust property. Thus where a person by his will vested the residue of his—personality, in trustees for the use of his daughter for life, with general power of appointment by will and she exercised such power, it was held that the property though subject to her power of disposal, was not—So strictly her own property as to render it liable to probate duty under her will as property—which she died possessed of entitled to [*Drake v. Attorney Genl.* 10 Ch and F 257]. In *Commissioner or stamp only v. Stephen* (1904) A C 137, 140 Lord Lindley said “The distinction between a person’s own property and property which is not his own, but which he can dispose of by will in any way he pleases by virtue of a power, conferred on him, is well established—Such last mentioned property is not his own in any proper sense and even if he executes the power by his will no probate duty is payable upon that property unless such duty is made payable by a statute so worded as clearly to comprehend it.” So in the goods of George [6 B.L.R., 138, 15 W.R. 457 F. N.] where a woman took a life estate in certain property under a settlement with a power of appointment by deed or will to be exercised in favour of her children and she exercised it by will, it was held that the property-over which the power was exercised was trust property and not liable to duty [*Drake v. Attorney Genl. Supra*, as followed. See *In the goods of Julia Oram* 12 B.L.R. App 21, 21 W. R. 245].

Civil Courts Jurisdiction as to sufficiency of duty :—It will appear from sections 19 k of the Court Fees Act (See app) that sec. 6 and 28 of that Act being not applicable to probate or letters of administration Civil Courts have no jurisdiction to question the validity of any such grant on ground of insufficient duty.

193. **77 (P).**
255 (s).—Whenever it appears to the District Judge or District Delegate, that letters of administration to the estate of a person deceased with or without a copy of the

Grant of letters of
administration to be
under seal of Court.

will annexed should be granted he shall grant the same under the seal of his Court in manner following :—

I—Judge of the District of—(or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's Jurisdiction) hereby make known that on the—day of—letters of administration (with or without the will annexed as the case may be) of the property and credits of—late of—deceased, he having undertaken to administer the same and to make
Form of such grant. a full and true inventory of the said property—and credits and exhibit the same in this court within six months from the date of this grant or within such further time, as the court may from time to time appoint and also to render to this court, a true account of the said property and credits within one year from the same date or within such further time as the court may from time to time appoint.

The—day of——18——.”

This Section as amended by section 13 of Act VI of 1889 corresponds to section 255 of the Indian succession Act, as altered by sections 8 & 9 of Act VI of 1881 and by Act VI of 1889 section 5.

Credits :—The word—‘credits’ means the effect of a transaction which may in all probability terminate in a debt or which has a direct tendency to produce a sum, due from one person to another that is a debt payable at a future day. For example, suppose that A is the acceptor of a bill of exchange for B's accomodation.

It is the duty of B, in such a case, to provide for the payment of the bill on maturity. But there is a possibility of his not doing so and should he fail to meet the bill, then in the absence of fraud the transaction between A & B, results in a *debt* due from B. the accomodated party, to A, the accomodation acceptor, since the former impliedly contracts with the latter to indemnify him in case of failure, on his part to meet the bill. On the otherhand, should B. perform his implied contract, no debt results and the bill, before payment is a “credit” given by the acceptor to the accomodated party (1). In like manner where goods are sold on credits to be paid for at a future day, the vendee becomes a debtor, and vendor his creditor, so that the effect of the transaction is a *credit* from the vendor to the vendee.

(1) See *Smith v. Hudson* and notes to *Rose v. Hart*, Sm. L. C. vol. II.

194. ^{78 (P)}
256 (s)

Administration
Bond.*

—Every person to whom any grant of letters of administration is committed and if the Judge so direct, any person to whom probate is granted shall give a bond to the Judge of the District Court, to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order directs.

* Form of Administration Bond :—

Know all men by these presents that we—

of———

Principal.

And———

of—

Surety

Are held and firmly bound unto the District Judge or District Delegate (as the case may be) of— in case No. of in the sum of Rs. only of good and lawful money to be paid unto the District Judge or District Delegate of for the time being, for which payment we do hereby bind ourselves, each and everyone of us, binds himself for the whole, each and everyone of our heirs, executors, administrators, or assigns firmly by these presents.

Signed and dated

19 .

Principal—

Surety.

The condition of this obligation is such, that if the above bounden administrator, without the will annexed property and credits of—deceased, do engage for due collection, getting in, and administering according to the law, the estate of the said deceased, which has or shall come to the hands of the administrator—and further do make or cause to be made a true inventory of the said properties and credits and the same so made do exhibit or cause to be exhibited into the registry of the court of the said District Judge or District Delegate of on or before the expiration of six months from the date of the grant of letters of administration and do render or cause to be rendered a true account of the said property and credits within a year from the said date and if it shall hereafter appear that any last will was made by the said—deceased and the executor or executors, named therein do exhibit the same into the said court and if the above bounden being thereto required to render and deliver

the letters of administration to him granted approbation of such will being first laid and made in the said court, the obligation to be void and of non-effect and else to remain in full force and virtue.

Signed and dated.

Principal—

Surety—

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 3a. <i>Invalidity of the grant and validity of the bond.</i> |
| § 2. <i>Origin of the practice in England.</i> | § 4. <i>Appeal.</i> |
| § 3. <i>Rigidity of the Rule.</i> | § 5. <i>Bond by Agent or minor on arriving at majority.</i> |
| | § 6. <i>Security from executor.</i> |
| | § 7. <i>Miscellaneous.</i> |

§ 1. **The Section :—**This section corresponds with Section 256 of the Indian succession Act, which is with slight verbal alteration sec. 81 of the court of Probate Act 1857 (20 and 21 Vict. c 77). The difference between these two sections consists in this, that under section 256 executors are not liable to give bond whereas under this section, administrators as well as executors are equally liable to give it, although in case of executors, the Judge has a discretion to dispense with the necessity of such bond.

The reason for the difference may be explained in the following words :—

“The Indian succession Act, following the English law it will appear however, reference being made to *Stanning v. Slyte* [(1734) 3 p. Wms. 33] that in England although formerly the ecclesiastical authorities failed to compel executors to give security under the Chancery courts, they could be compelled to furnish security before entering actually upon the discharge of his trust. Sec. 18 cyc A. M. 128 J.) provides for the taking of security for the due discharge of this office only from an administrator, it being considered that in the case of an executor, who is selected by the testator himself, such security can safely be dispensed with. But amongst the classes to which this Act will apply, cases will, it is apprehended, occasionally occur, in which it may be expedient to take security even from an executor and accordingly a section has been inserted in the Bill amending section 256 of the succession Act in such a manner as to give a power to the court to require an executor to give security” (statement of objects and reasons para. 8.)

Before the passing of Act VI. of 1889, under section 256 of the succession Act as it then stood, executors as well as administrators were liable to give bond [see *In bonis Jogodishwari Debi* I. L. R. 7 C. 84, 8 C. L. R. 397 and *Run Bahadoor Singh v. Maharane Rajrup Koer* 4 C. L. R. 498].

Section 256 has been further amended by the addition of the words and figures “other than a grant under section 212” after the word “administration” of section 9 of Act V of 1902.”

§ 2. Origin of the practice in England :—In the old days when the goods of intestates, vested in the prelates, who held them in trust for such pious purposes as would benefit the soul of the deceased, these prelates being spiritual men, were accountable to none but to god. See Introduction sec. 4 (P) *ante*. Thus, they enjoyed, the most unlimited powers with regard to the disposal of such goods.

This being so, in course of time, great abuses prevailed and when the spiritual courts were brought under the control of the Legislature it became necessary for these courts, in granting administration, to take bonds from the administrators appointed by them, to compel the distribution of the goods of the intestates among their relations (2). This is the origin of the practice of taking administration bonds. See *In the goods of Gour Charan Thakoor* [1 In Jur N. S. 299] in which it was held that the rule of the Ecclesiastical courts in England according to which security is required only as to personality, should be followed in regard to Hindu Estates as well as English estates (3).

Note.—This practice may be quite suitable to the system of property and the conditions of life that prevail in England, but it seems rather hard and anomalous, that in this country where there is no distinction between real and personal property and the conditions of life and property are wholly different, a son being an universal legatee in taking out letters of administering the properties of his father, should have to execute a bond under this section, whereas a stranger, who may happen to be appointed an executor should administer the same properties under the grant of a probate but without any such bond or other security.

§ 3. Rigidity of the Rule :—The rule under this section is so extremely rigid that the court has no power under any circumstances to dispense with the administration bond. [*In bonis Powis* 34 L. J. P. & M 55] (4) not even where there is no property to administer. [*In bonis Aaron shalome Gubbay*, I. L. R. 26 C. 408, 3 C W. N. 364.]

The court may however, in the latter case, only modify the form of the bond (*Ibid*) and in all cases "ought to exercise a reasonable discretion in prescribing the sum for which the bond should be given" according to the circumstance of each case [Morris J. in *In bonis Jagadishwari Debi*, I. L. R. 7 C 84 see *Mahamaya Debi Chaudhurani v. Gangamoyi Debi Chaudhurani* 1 Cal. L. J. 180].

So the court will not discharge the original surties to an administration bond and allow other sureties to be substituted for them. [*In bonis stark* L. R. I. P. & D. 76] (5). Upon proof, however, that the administrator is maladministering the estate, the surety is entitled at any time to withdraw, provided, he is powerless to stop such maladministration by instituting administration proceedings [*Raj Narain Mookherjee v. Phulkumari Debi* 6 C. W. N. 7. I. L. R. 29 C 68.]

But according to Sir Arnold White C. J. and Mr. Justice Subramania Ayyar, the law has not been correctly laid down in *Raj Narain Mukherjee vs. Phulkumari Debi* (*supra*). They are of opinion that the Probate court has no power to make any order, discharging a surety from his past or future liability either in a suit or application, following the principle In *re Stark* (*supra*) they

(1) 2 block 445.

(2) *Ibid*; Markby's Element of Law 401 5th Edn.

(3) Belch 313.

(4) Bro. P. P. 251; Walker and Elg. 93.

(5) Bro. P. P. 259; Tr. and Coote 104, Walker and Elg. 94.

say "No precedent is to be found for the order which we are asked to make and on principle we do not think that any such order ought to be made. The making of such order might, defeat the object for which an administrator is required to find sureties to his administration bond [*Subraya Chetty v. Ragammall* I. L. R. 28 M 161]. It has been further held by the Madras High Court (Sir Arnold White, C. J. and Krishna Swami Ayyar, J) that the Probate court has no power under the Act to order the discharge of a security even after the estate has been fully administered. As a matter of fact, the bond becomes *ipso facto* void and of no effect on the fulfilment of the conditions specified therein, that is on the administration becoming complete. Mr. Justice Krishna Swami Ayyar is of opinion that there is nothing in the Act "authorizing the administrator to make an application to the court for an order of discharge, or for a declaration that administration has become complete [*Arther Gerald Norton Knight, In re* (1909) 33 M 373].

Section 130 of the Indian Contract Act (Act IX of 1872) is applicable to the case of surety bond, executed under this section as held in *Raj Narain Mukherjee v. Phulkumari Debi* (*supra*), but a contrary view expressed in *Subraya Chetty v. Ragammull* (*supra*) and *Bai Sami v. Chokshi Ishwar Das Mangul Das* [I. L. R. 19 B. 245.]

§ 3a. Invalidity of the grant and validity of the bond:—

The validity of the bond is not dependent upon that of the grant, that is to say, the invalidity of the grant does not render the surety bond void or inoperative. In other words, the liability of the sureties, does not depend upon the validity or invalidity of the grant, but depends upon the nature and object of the bond itself. "The object of demanding sureties" says Mr.

Nature and object of the security bond. Justice Mitra "is to prevent the evil consequences of malfeasance or misfeasance by an administrator and to protect the interests of the persons, really entitled to the assets of the deceased. The administrator holds the estate for certain purposes and is responsible to the court for his dealings. The Court in requiring bond from the administrator and his sureties—contemplates not only the effect of mal administration but also the chances of the grant being subsequently declared void or voidable" or as Sir Francis Maclean C. J. says "the bond contemplates the possibility of a will turning up" this being so, the grant may be revoked, but yet the sureties will remain liable for if this were not so, the very object of demanding sureties would be frustrated. [*Debendra Nath Dutta v. Administrator General Bengal* 10 C. W. N. 673, 3 Cal. L. J. 422, I. L. R. 33 C. 713 confd: 12 C. W. N. 802 P. C., 8 Cal. L. J. 94, 18 Mad L. J. 367, I. L. R. 356, 955, 10 Bom L. R. 648, 35 L. R. I. A. 109.]

Accordingly where a person made false representation to the court and thereby obtained an order granting him letters of administration to the estate of a deceased person, and induced two other persons to stand sureties for him, by means of similar misrepresentation and showing them a copy of the said order, where upon they, in ignorance of the true state of affairs, executed an administration bond and letters were issued in his favour, it was held sec. 130 of the Indian Contract Act (Act IX of 1872) did not apply and the bond was not void. [*Debendra Nath Dutta v. Administrator General Bengal, supra* *Sarat Chandra Rai Chaudhury v. Rajoni Mohan Roy.* 12 C. W. N. 132, 14.]

Object of the Rule : and amount of bond. The security is only required for the faithful discharge of the office and to guard against malfeasance and such

security is enough, if it affords reasonable protection against mal practices, which require time, to be carried out. What the court has to satisfy itself, is whether, the amount of the security affords a sufficient safe guard against serious and contentious mismanagement. It ought to be remembered that if the security is very high or if conditions are imposed which make it impracticable for the applicants to furnish the security demanded and consequently no letters of administrations are taken out, the safety of the estate may seriously be imperilled, specially where the estate is heavily encumbered and Government revenue has to be regularly paid [Per Mukherjee J. in *Amarchand v. Mohammad Bibi* 6 Cal. L. J. 453, see *Mohamaya Debi Choudhurani v. Gangamayi Debi Choudhurani* 1 Cal. L. J. 180]. So the amount of the bond must not be unnecessarily heavy (*Ibid*). In America, the amount of the bond is ordinarily fixed at double the value of the personal property (Rood §813 page 527) the amount is quite reasonable and there does not seem to be any reason why this should not be regarded as a standard in this country.

§ 4. Appeal :—No appeal lies from an order as to security on the ground that it is insufficient [*Lucas v. Lucas* 1. L. R. 20 C. 245.]

§ 5. Bond by agent or by minor on arriving at majority :—when there has been a grant *duranti minore actate*, the minor on coming of age, in taking administration himself, is bound to give security to the same amount as the administrator in the first instance [*Abbott v. Abbott* 2 Phill. 578] (1). On the same principle, letters of administration to an agent or attorney being on the same terms as to his principal, the conditions of the bond must also be the same [*In bonis Goldsborough* 1 S. W. & T. R. 295.] (2)

In the original side of the High Court in Calcutta, the practice is to require security only from insolvent executors following the practice in England. (3)

§ 6. Security from Executor :—Security from Executors is not to be demanded for the first time, at any time after the grant of probate [*Giribala Dasi v. Bijoy Krishna Halder*, 1. L. R. 31 C. 188, 8 C. W. N. 668]. The youth of the executor, the property being large, is a ground for requiring security [*Mohamaya Debi Choudhurani v. Gangamayi Debi Choudhurani* 1. Cal. L. J. 180]. There are other grounds for requiring security from an executor. Some of these, as held in the American Courts are :—The fact that the executor is a non-resident [*Grigsby v. Cocke* 85 Ky. 314, *Yerkes v. Broom* 10 La Ann 94, *Harberger's Appeal* 98 Pa St. 29] or that his financial circumstances are precarious [*Freeman v. Kellog* 94 Redf. Surr. (N. Y.) 218] or that the conduct of the executor, shows a want of fidelity in the execution of the trust [*Holcomb v. Coryell* 12 N. J. E. Q. 289] or where he has wasted or mismanaged the estate or there is a reasonable ground for apprehending that he will do so [*Johns v. Johns* 23 Ga 31. *Re Halderbaum* 82 Iowa 69 *Bird v. Wiggins*, 35. N. J. Eq. III *Holcomb v. Caryell*, *Supra*].

Every person to whom &c. :—That is no administrator, under this act, is exempted from the liability of giving bonds and acting directly under the direction and control of the court of Probate. It is submitted therefore, that the rules precedents as regards discharge of Surety, rendering of accounts &c. applicable in case of one administrator, are applicable in case of other

(1) Walker and Elg. 94.

(2) Wins 554 Bro. P, P. 175, Walker and Elg. 93.

(3) Belch 315.

administrators, or in other words, those rules and precedents seem to be of general application.

§ 7. **Miscellaneous** :—This section is not limited in its operation to the execution of a surety bond when the letters are first granted but is also applicable, if during the continuance of the letters, the bond becomes inoperative by reason of the death of the surety or its cancellation from some other cause [*Raj Narain Mukherjee v. Phulkumari Debi* 6 C. W. N. 7; I. L. R. 29 C. 68] But see [*Subrayo Chetty v. Rajammall* I. L. R. 28 M. 161 followed in *Kadhya Lall v. Manki* 31 A 56] in which Sir Arnold White C. J. & Mr. Justice Subramania Ayyar held a contrary view.

195. **79 (P)**.
257-(s).—The court may on application made by petition and on being satisfied that the

Assignment of administration bond.

engagement of any such bond has not been kept and upon such terms as to security or providing that the money received, be paid into court or otherwise, as the court may think fit assign the same to the proper person who shall thereupon be entitled to sue on the said bond in his own name as if the same had been originally given to him instead of to the Judge of the court and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.

NOTES AND COMMENTARIES.

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| 1. Section :— | § | 3. Amount of damage |
| 2. What amounts to a breach of the bond. | § | 4. "Proper person" |
| | § | 5. "And on being satisfied &c." |

§ 1. **The section**.—This section is modelled upon Section 83 of the English Court of Probate Act 1857 (20 & 21 vic C 77)* and corresponds with section 257 of the Indian Succession Act.

* Section 83 of the English Act runs as follows :—the court may on application made on motion or petition in a summary way and on being satisfied that the condition of any such bond has been broken order one of the Registrars of the court to assign the same to some person to be named in such order and such person his executors, or administrators, Shall there upon, be entitled to sue on the Said bond in his own name both at law and equity as if the same had been originally given to him instead of to the Judge of the court and shall be entitled there on as trustee "for all persons, interested the full amount recoverable in respect of any breach of the condition of such bond."

§ 2. What amounts to a breach of the bond.—Failure to exhibit inventory is a breach [*Lachman Das v. Chater* I. L. R. 10 A 29]; so is failure to make a just and true account [*Archbishop of Canterbury v. Willis*. 1 Salk 172, 315] (1). But delay in exhibiting inventory, would not in the absence of any actual damage, entitle an assignee of the bond to recover the penalty (*Ibid*). Administration bond executed by an administrator, does not come within the exception of Section 74 of the Indian Contract Act. (IX of 1872) (*Ibid*).

Conversion of the goods of the deceased to the administrator's own use, but to the loss of the estate [*Archbishop of Canterbury v. Robertson*, Crompt &c., M. C. 90] or payment of a legacy bequeathed to an infant, to a person who afterwards absconds amounts to a breach of the condition to administer [*Dobbs v. Brain* 20 B 207] (2) or distributing the whole estate without retaining in his hands a sum sufficient to pay a legacy left to such an infant on his attaining majority.

In *Bolton v. Powell* [2 De G. M &c. G 1 17], it has been questioned whether the circumstance of the administrator, dying largely indebted to the estate of the intestate is a breach (3).

§ 3. Amount of damage.—In *Luchman Das v. Chater* (I. L. R. 10 A., 29), it was held under section 74 of the Indian Contract Act (Act IX of 1872), that the plaintiff could not recover more damages than he proved to have resulted to himself or those interested in the bond on which he relied. But regard being had to the amendment of that section by section 4 of Act VI of 1899, it would appear that even if actual damage be not proved, reasonable compensation not exceeding the amount mentioned in the bond could be given [see *Cursetjee Pestomjee Bottliwalla v. Dadabhai Eduljee*, I. L. R. 19 M., 425].

§ 4. "Proper person."—A creditor of the deceased seems to be a "proper person" within the meaning of this section [*Luchman Das v. Chater*,] (*supra*). But the assignment will not be made at the instance of a creditor who can otherwise recover his debt [*In re Saunders*, 6. N. W. P. H. C. R. 62]. The administrator General is a "proper person" within the meaning of this section [*Debendranath Dutt v. Administrator General of Bengal* 3 Cal L. J. 422; 10 C. W. N. 673, I. L. R. 33 C. 73. 12. C. W. N. 802. P. C. 8 C. L. J. 94, 10 Bom. L. R. 648. 35 L. Q. J. N. 109. I. L. R. 35 C. 955, 18. Mad L. J. 367]. It will thus appear that this section is not confined to private individuals only. (*Ibid*).

§ 5. And on being satisfied &c.—The Court seems to have a discretion under this section in the exercise of which it will only order the assignment of the bond when it is satisfied that the application is made *bona fide*, and that a *prima facie* case has been made out (*In bonis Young*, L. R. 1 P. & D. 186; 35 L. J. 126). It may refuse to assign on a frivolous or vexatious ground [*Baker v. Brooks*, 3 Sw. & Tr. 32] (4).

Before assignment made, some form of notice should be given to the sureties and the administrator [*Bekar v. Brooks*, *supra*]
Notice. *Marshman v. Hughes*, 3 Sw. & Tr. 32] (5).

(1) Wms. 547.

(2) Wms. 548; Walker and Elg. 97.

(3) Wms. 548 (i); Walker and Elg. 97.

(4) Bro. P. P. 260; Tr. and Coote 105; Walker and Elg. 97.

(5) Bro. 260, wars 543 (m)

In suing on the bond, the plaintiff may prove breaches other than those alleged by him when he obtained permission to sue
Proof. [Archbishop of Canterbury v. Robertson, 1 Crompt. & M. 690] (1).

No one except the Judge or the person to whom the bond is assigned under this section can sue [see *Amarnath v. Thakur Das*, I. L. R. 5 A. 248].
Who can sue.

Assignment.—A Judge has no authority to assign an administration bond a second time, that is to say to a person, so long as a previous assignment of the said bond to another person is in force [*Kalimuddin v. Meharni* (1912) 39 C 563].

In his own name.—The assignee may sue in his own name provided the suit is for the benefit of the estate [*Cope v. Burnett* (1911) 2 Ch 488].

196. 80 (P).
 258 (S).—No probate of a will shall be granted until after the expiration of seven clear days and no letters of administration shall be granted until after the expiration of fourteen clear days from the day of the testator or intestate's death.

Time before which probate or administration shall not be granted.

"I understand" Mr. Justice Phear says, "letters of administration, not to include the case of letters of administration, with the will annexed. The distinction, intended by the Legislature, appears to me to be this: when a will is proved the grant may be made on the lapse of seven clear days but where there is no will not until after the expiration of fourteen clear days" [*In the goods of Wilson* I. L. R. 1 C. 140].

The period is to be computed excluding the day the testator or intestate's death (2). As regards this section, it seems a popular mistake, prevails at least in the mofussil and even among the legal practitioners to the effect, that no application for probate or letters is to be made until after the expiration of seven and fourteen days from the testator or intestate's death. But this is not so. The section provides that no probate or letters shall be granted &c. and not that, no application, for such grant is to be made (see *Re-Wilson, supra*). According to the rules of practice of the Courts in England no probate or letters shall issue, until after the lapse of seven or fourteen days, respectively from the death, of the deceased. As to the time after the testator's death, when the will is to be proved Mr. Justice William is of opinion that it is uncertain and is left to the discretion of the Judge according to the distance of the place, the weight of the will the quality of the executor, the absence of the witnesses, inopportunity of the creditors and legatees and other circumstances incident thereto." (Wms 233 10th edition.) It appears to be certain, therefore that there is nothing to prevent one from applying for probate or letters immediately after the death of the deceased. In other words under the present state of the law in this country, there is no prescribed period, after

(1) Walker and Elg. 97.

(2) Tr. and Coote 106.

or within which, an application for probate or letters, is to be made. See *ante* sec. 18 (P) § 1 sec. 55 (P) § 5 and sec. 69 (P) § 5 (W) sec. *Re Wilson supra*.

197 **81 (P)**.—Until a public registry for wills, is established, every District Judge and District Delegate, shall file and preserve among the records of his Court, all original wills of which probate or letters of administration with the will annexed may be granted by him ;

Filing of original wills of which probate or administration with will annexed granted.

and the Local Government shall make—regulations for the preservation and inspection of the wills so filed as aforesaid.

This is section 259 of the Indian Succession Act the wording of which is slightly different. No special public Registry has been established in this country.

As to deposit of wills, under the Registration Act See sections 42 to 45 of that Act III of 1877 corresponding with XVI of 1908. Section 46 (1) of that Act, provides "Nothing here in before, contained, shall affect the provisions of section 259 of the Indian Succession Act or Section 81 of the Probate and Administration Act (Act of 1881) or the power of any court by order to compel the production of any will."

In the statement of objects and reasons for Act XVI of 1908 a note is added to section 46, to the following effect. "Section 46 of the Act, saves the provisions of Section 259 of the Indian Succession Act. 1865 relating to the filing and preservation of wills in the Court of the District Judge and Delegates. Exactly the same provisions have been enacted in section 81 of the Probate and Administration Act 1881 in respect of Wills to which the Succession Act does not apply, these provisions being contained in a later enactment are not affected by the provisions of the Registration Act to the contrary. To avoid any question as to the effect of the re-enactment of the law relating to registration and to preserve the law unaltered, the provisions of Section 81 of the Probate and Administration Act have been expressly saved by introducing a reference to that enactment in the clause".

In England wills constituting merely a nomination of representatives was regarded 'as a public document, which everyone who had claims or liabilities in respect of the testator's estate was entitled to inspect. This was so, under the authority of the Ecclesiastical Court which required that the executor would prove the will before it could be recognized in any other Court. It was these Courts again which by giving the executor an office copy of the will (*i. e.* probate) perfected his representative title rendering sealed copy the conclusive evidence in every Court of the validity and contents of the will and also the title of the executor. See Strah will 62, 63, Wms. R. P. ; Wms. 10. Edn.

Of the wills in the court of the District Judges and Delegates. Actually the same provisions, have since been enacted in section 81 of the Probate and administration Act 1881 in respect of wills to which, the Succession Act, does not apply and these provisions being contained in a late enactment are not affected by the provisions of the Registration Act to the contrary. To avoid any question as to the effect of the reenactment of the law relating to registration and to preserve the law unaltered the provisions of section 81 of the Probate and Administration Act, have been expressly saved by introducing a reference to that enactment in the clause.

In England, wills constituting merely a nomination of representatives was regarded to be public documents which everyone who has claims on estates was entitled to inspect. This was so under the authority of Ecclesiastical Court which requires that the executor should prove the will before it could be recognized in any other court. It was these courts again which by giving the executor an office copy of the will (*i.e.* probate) perfected his representation better, rendering such copy, the conclusive evidence in any court, of the validity and contents of the will and also the title of the executor. See *Starle*, will 62—63, Weirs report 10th edition.

198. 82 (P).
260 (S).—After any grant of probate or letters of

Grantee of probate
or administration al-
one to sue, &c., until
same revoked.

administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked.

See *Satya Prosad Pal Choudhury v. Motilal Pal Choudhury* (I. L. R. 27 C., 683, at 688) and sec. 92 (P), § 9, *infra*. See also sections 4 (P) and 12 (P). In 1 Cal L. J. 28 n, *Dhirendra Kanta Roy Choudhury v. Saradindu Roy* (9. C. W. N. X ci) a rent suit, which was instituted against a minor beneficiary, was dismissed, the executors who had taken out probate not being made parties. See [*Hossainara Begum v. Rohimannessa Begum* 386 342, 13 Cal. L. J. 3.]

199. 83 (P).
261 (S).—In any case before the District Judge in

Procedure in con-
tious cases.

which there is contention, the proceedings shall take as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be shall be the

plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.

NOTES AND COMMENTARIES.

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| § 1. "Contention." | § 5. "Parties." |
| § 2. "Suit." | § 6. "Subject-matter of suit." |
| § 3. "The form of a suit." | § 7. "Compromise." |
| § 4. "As nearly as may be." | |

§ 1. "Contention."—See sections 69 (P) and 73 (P) *ante*.

The entry of a caveat does not make a case necessarily contentious. It is upon the filing of affidavit in support of the caveat in the High Court and the written statement in the Maffasil opposing the grant that the matter becomes contentious [*Chhotalal Chunilal v. Bai Kabubai* I. L. R. 22 B. 261. *Surendra Nath Gupta v. Kasimoni Debi* 1 Cal. L. J. 49 n.]

§ 2. "Suit."—The words "suit" and "action" are synonymous. The best and most comprehensive definition of "action" is "the lawful demand of one's right." But in its most appropriate sense, it is defined to mean "that formal course of proceeding, which a person seeking to enforce, a right, is by law bound to adopt," or it may be defined to be "one peculiar made, pointed out by the law for enforcing a remedy or prosecuting a claim or demand in a court of justice (1)

A "Suit" may also be defined to be a remedial instrument of justice whereby the plaintiff, seeks to recover a right or to enforce a claim against a person who is his opponent (per Powell J in *In re Chiranjil Mal*, 1884 Punj Rec, 145.)

In England by the supreme court of Judicature Act 1875, it is declared that "all actions which have hitherto, commenced by.....citations or otherwise in the court of Probate, shall be instituted in the High Court of Justice, by a proceeding to be called an action" and "every action in the High Court shall be commenced by a writ of summons." Thus although "writ of summons" is substituted for "citation," as the initiary step, in contentious probate business, the present mode of beginning a probate action, appears to have the same operations which the citation formerly had, in commencing a suit." The only result of this change seems to be that, what was formerly called a probate suit, is now termed a probate action. So that, "The proceeding necessary for obtaining a judgment or final decree of the court in relation to the granting of probates or administrations which was termed in Prerogative court a cause and in the court of probate, a cause or suit, is in the High Court termed an action." (2)

Thus what is termed in England an "action" is in this country* called a "suit." Generally speaking, a suit or action is "between the persons who are arrayed on opposite sides in a controversy." The essentials of a suit or what a suit is formed of, may therefore be said to be "persons arrayed on opposite sides," that is parties "described as plaintiffs, defendants, or interveners." (3)

(1) 2 Warren's L. Stud 756, 3rd Edn.; Broom's L. M. 192, 5th Edn.

(2) See Bro. P. P. 274, 275; Flood. 675-76; Tr. and Coote 356.

(3) Tr. and Coote 360.

§ 3. "The form of a suit."—Accordingly, it would appear, that, the proceedings, when there is contention, should under this section, take the "form of a suit" in relation to such parties only. But this is not perhaps the correct meaning of the section. The section seems to mean that the proceedings shall take the form of a suit, not only in relation to such parties, but in relation to its procedure, as well, which is to be governed by the Code of Civil Procedure, although they are not suits properly so called [*Arunmayi Dasi v. Mohendra Nath* I. L. R. 20 C. 888]*. So it has been held that as soon as a petition for probate or letters of administration becomes "contentious," it is to be treated as a plaint in a suit, and the suit is to be governed, so far as practicable by the procedure prescribed by the Civil Procedure Code [*Chotalal Chunilal v. Bai Kubabai* I. L. R. 22 B 261 *supra*, *Surendra Nath Gupta v. Kasimoni Debi* 1 Cal. L. J. 49 n *Pakiam Pellai v. Innosi Fernand*, I. L. R. 19 M. 456], where therefore, an application for probate was withdrawn before it became contentious, the applicant was allowed to propound the same will in opposition to an application for letters of administration. In this case section 373 of the Code of the Civil Procedure did not apply, because the withdrawal took place before the proceedings took the form of a suit [*Pakiam Pellai v. Innosi Fernand*, *supra*] for the same reason, it is not obligatory upon the petitioner, to fill list of their documentary evidence with the application or subsequently to give a list of them [*Surendra Nath Gupta v. Kasimoni Debi* 1 Cal. L. J. 49 n.]

Right to cross examine.—It appears that when a person has been cited to come and see: he proceedings under sec 69 (P) *ante*; and the proceedings have taken the force of a suit such person can not be denied the right, to cross examine his opponent's witnesses even before he is found to have a locus standi [*Chattoo Karmi v. Rajaram Tewari* (1909) 11 C. L. J. 124, F. B.]

§ 4. "As nearly as may be."—That is "so far as the circumstances of the case will permit and subject to the exceptions noted in section 55 (P) *ante*. As to how the procedure is to be regulated "the question is what practice would be most in keeping with the Indian Succession Act (X of 1865) the Probate and Administration Act (V of 1881), the Code of Civil Procedure (XIV of 1882) and so far as applicable, the rules of practice and procedure of the probate Divisions of the High Court in England." [Strachey J. in *Chotalal Chunilal v. Bai Kabubai* I. L. R. 22 B, 261.]

Thus where the *caveator* refused to answer a question, it was held that section 177 of the Code of Civil Procedure (Act. XIV of 1882) did not justify the Judge to dispense with the proof of the execution of the will and pass a decree for probate in favour of the petitioner [*Ravji Ranchoo Naik v. Vishnu Ranchoo Naik* I. L. R. (1884) 9 B 241 *per* Sir Charles Sargent C. J.] see sec. 55 (P) *ante*.

* Mr. Justice Chandravarkar Says. The section does not say that proceedings for probate are a "regular suit" or that they shall be treated as such for all purposes. It provides that "they shall take as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure." This would show that probate proceedings do not, under the ordinary cases, fall within the description of a regular suit it is by virtue of section 83 that they are brought within that category and they are so brought, not in point of fact, but only in point of form, for the limited purpose of applying to them, as nearly as may be the provisions of the Code of Civil Procedure (*Sundrabai Sahab v. Collector of Belgaum* 10 Bom. L. R. 1197 at 1200 33 B 256, at 257. But, "suit" or no 'suit' it seems an order granting probate is a 'decree' within the meaning of the Civil Procedure Code Act. V of 1908, (see *Umrao Chand v. Brindaban Chand* 17 A 475; *Wood C. P. C.* 44.)

§ 5. Parties :—It has already been noticed (sec. 50 (P) *ante*) that “the foundation of title to be a party to a probate or administration action is interest. So that whenever, it can be shown that it is competent to the Court to make a decree in a suit for probate or administration or for the revocation of probate or administration, which may affect the interest or possible interest of any person, such person has a right to be a party to such a suit in the character either of plaintiff, defendant or intervener.”(1) Parties to probate actions (or more generally testamentary causes or suits), therefore include plaintiffs, defendants, intervener and persons cited to see proceedings (2).

As the terms, plaintiffs, defendants (3) and interveners, have not been defined in the Code of Civil Procedure, the following definitions may be deemed useful :—

The term “Plaintiff” “shall include every person asking any relief (otherwise than by way of counter claim as a defendant) against any other person by any form of proceeding whether the same be taken by action, suit, petition, motion summons or otherwise.” [See *Haji Bibi v. H. H. Sir Sultan Mahamed* 10 Bom. L. R. 327.]

‘Defendant.’ “shall include every person served with any writ of summons or process or served with notice of or entitled to attend any proceedings.” [see 100 Judicature Act of 1873 (36 & 37 Vic C. 66).]

‘Intervener.’—An intervener is a party who voluntarily interposes or who “upon leave obtained on summons has entered an appearance in a pending action for the purpose of protecting his interests in such action and it is open to him to support the case either of the plaintiff of the defendant of another intervener or to set up an independent case in his own behalf (4). “A party who is brought into the contest by being cited, is not an intervener.” (5)

Intervener's interest :—In order that a person may intervene in a suit for revocation, it is not necessary that he should have had an interest at the time of the death of the deceased. Interest-subsequently acquired by purchase from the administrator, has been held to be sufficient for the purpose [*Lindsay v. Lindsay* L. R. 2 P. & D. 459, 21 W. R. (England) 271] (6). An intervener allowed to be made a party in appeal under Courts' in servant power [*Saroda Kanta Das v. Gobinda Mohan Das* (1990) 12 C. L. J. 91, 100, 103].

In a revocation suit the character of the parties as parties and defendant stands reversed; for in such a suit the party applying for revocation is the defendant and the executor or administrator who appears on citation is the plaintiff. (7)

§ 5 (a) :—Whether revocation proceedings are suits :—as to whether revocation proceedings are suits there have been some conflicting decisions in the Calcutta High Court. In [*Protap Chandra Saha v. Kali Bhanjan Saha* 4 C. W. N. 600; & *Garabini Dasi v. Protap Chandra Shah*, *Ibid* 600] Bannerjee & Stevens J. J. held that revocation Cases were miscellaneous proceedings. But in *Sheib Azin v. Chandra Nath Nam Das* [8. C. W. N. 748]

(1) Tr. and Coote 361.

(2) Bro. P. P. 284.

(3) But see sec. 326 and 28 Code of Civil Procedure (Act XIV & 882)

(4) Tr. and Coote 360; Bro. P. P. 277, 286.

(5) Bro. P. P. 286

(6) Bro. P. P. 288.

(7) Bro. P. P. 298.

Woodrooff and Brett. JJ. held a Contrary View and expressed their opinion to the effect, that such cases must be treated as suits. The question again arose in *Khiroda Moyi Barmani v. Bogola Sundari Barmani* [4 Cal. L. J. 492], but their Lordships (Rampini & Mukherjee JJ.) did not think it necessary to decide the question or refer it to a full Bench.

The Correct view seems to have been taken in, In the goods of Horendra Krista Mukherjee (5 C. W. N. 383). In that case Mr. Justice Harington draws a distinction between revocation cases according to the grounds on which they are based. Referring to form of plaint No 115 in Schedule IV Code of Civil Procedure (Act IV of 1882), his Lordship Says "This form is only applicable to a case in which the ground on which the relief, is sought is that the will is invalid. It could not be used in a case in which an application is made to recall the grant of probate of a valid will on the ground of some irregularity in making the grant. Such an application as that, will be properly made by motion [See *In the goods of Mohendra Narain Ray* 5. C. W. N. 377].

Thus it is clear that in cases where the ground on which revocation is sought is any thing, touching the validity of the will, such as fraud, forgery undue influence or the like, the proceedings are to be initiated by plaint and the cases are necessarily suits, but where such grounds, are mere irregularities, they are to be initiated by motion and are as a matter of course to be denominated "miscellaneous proceedings" This accords with the practice in England on which this portion of the act, is entirely based (See *ante* Sec. 50 (P) §10).

The words "In any case" in this Section, are sufficiently, comprehensive to comprise revocation cases of all denominations, for there can not be any doubt that all such cases are, however, initiated and tried contentious, the mere plaint or application being, an appearance of a party in opposition to a grant [Sec. 73 (P) Enpt]. It can not be that the, Legislature, intended to exclude all revocation proceedings from the operation of this section or that the words "to oppose" in the expl to Sec. 73 (P), are meant to include opposition before grant only and not after. But there seems to have been an omission on the part of the Legislature for "there is nothing in the Chapter to indicate what procedure is to be followed where a grant has already been made and it is sought to set aside that grant" [Harington J. in *In bonis Horendra Krishna Mukherjee, supra*]. This is being so, regard being had to the fact that, though contentions, the lengthy procedure of a regular suit, is not necessary for the ends of Justice in all cases of revocation the procedure laid down above may be taken as the best, until the Legislature interferes.

§ 6. Subject matter of suit :—"In a testamentary proceeding, the 'subject matter of the suit', is the property of which the executor is the legal owner under the will of the testator, and of which, the probate by declaring him to be executor, recognizes him before the court as legal owner ["Starling J. in *In re Haji Khan Hubib Khan*, I. L. R. 18 B 237 at 240.]

§ 7. Compromise :—In compromising probate actions this to be borne in mind "that the court will not make itself a party to the compromise of an action with the facts of which it is entirely unacquainted and therefore will not allow terms of compromise arranged between the parties before the trial to be made an order of court, even in cases where the parties have agreed that this should be done."(1)

Thus in a suit where compromise is effected before trial, the court will not make the terms of such compromise a rule of court, as it has no power to enforce compliance with the terms. In such cases the Court will only make an order that the proceedings will be discontinued [*Read Night v. Carter*, 3 Sw & Tr 421] (1) *Kanja Lal Chaudhury v. Kailash Chandra Chaudhury* (1910) 14 C. W. N. 1068.]

The court will not recognize a compromise one of the terms of which is, that, some of the executors named in the will should renounce [*Hargreaves v. Wood*, 2 Sw. & Tr 602.] (2), nor one the effect of which is to exclude evidence in proof of the will [*Monmohini Gupta v. Banga Chandra Das* I. L. R. 31 C. 357 8 C. W. N. [197, *Read Night v. Carter*, *Supra*].

Where an application for probate being contested the parties entered into an agreement settling their difference and the court in granting probate declare "that administration of the property and credits of the said deceased and in any way concerning his will and codicil and according to the agreement aforesaid was granted" it was held on appeal that this was most unusual. Mr. Justice Woodroffe in pointing out the procedure said "There would be no 'amended probate' (or conditional probate) as stated in the *Ekrar-namah* (agreement) but when a testamentary instrument is propounded and a caveat against the grant is entered, it is common practice, that opposition to the grant should be withdrawn upon terms. Upon this being done, the promovent, proceeds to prove the will, unless probate has already been granted in common form. In such a case and according to the practice in the original side of the court, the caveat is discharged and the grant made. Such an order is alone within the scope of the suit. But, if a settlement is to be arrived at under which opposition has been withdrawn, it is recited in the decree that the parties have agreed to terms of Settlement and it is ordered that such terms be recorded. The terms are then recorded in a schedule annexed to the decree, such terms, when, as they ordinarily are, beyond of the scope of the suit, are not the subject matter of the decree and if not carried out, must be enforced by separate suit". [*In Kamal Kumari Devi v. Norendra Nath Mukherjee*, 9 Cal. L. J. 19 at 29—30].

But after the will is probated, the beneficiaries, may contract with reference to the property, given them by will, just as they may, with reference to property annexed, in any other way [See *Ibid Napier v. Anderson* 95 Ga 618]. In this connection, Page says "But to—concede to the beneficiaries, Mr. the right to suppress a will and, to refuse probate to a will which is perfectly a valid document simply by reason of a subsequent agreement between the heirs and beneficiaries is contrary to the policy of the law of wills that on sound principle the position seems untenable (Pages § 346 P. 418)"

A will may be modified or rendered in-operative by compromise [*Horapal Singh v. Rakhraj Kunwar*, 30A. 406. See *Jamnabai Dhorsey* 4 Bom. L. R. 893]. But a compromise, before the discovery and in ignorance of the existence of the will and on the mistaken belief that there is no will, can not have that effect. On the contrary, when the will is discovered such will shall make, the compromise in operative (9 C. W. N. cxxix).

(1) *Ibid* 372 Powel & Oak 235, 236, 4th Edn.

(2) *Ibid*,

As to what agreements on compromise are valid and enforceable [See *Surja Prosad Sukul v. Shyuma Sundori Debi* (1910) 14 C. W. N. 967 Garcelon 104 Calif 570, Page on wills § 346].

The action of a court of Probate, is in the nature of a proceeding in rem and therefore, where a will has already been declared to be a forgery by such a court a compromise, the effect of which would be to restore the probate, multiplying the previous judgment will not be allowed between the parties, specially in appeal stage [*Sarada Kant Das v. Gobind Mohan Das* (1910) 12 Cal. L. J. 91, See *Mon Mohini Guha v. Bangu Chandra Das* (1904) 31 C. 357 8 C. 8 C. W. W. 197, also *Jenkins v. Robertson* (1867) L. R. 2 S. C. & Dir 117].

As regards, terms of compromise it seems to be established that there can not be any limit to such terms, for the said terms may in effect make a new will for the testator so that an executor may agree that the will, he propounds shall be admitted to probate, but that he will administer the estate in accordance with the provisions of a revoked will (1). But if the terms are to the effect that the will shall be pronounced for, or against proof of such will cannot be dispensed with. The court must be satisfied by evidence that the will was only executed or is invalid. (2)

The rule that in the Court of Probate, a person, though not a party to a suit will be bound by its results if he has been privy to it, does not apply where the suit is compromised. The reason is persons are to abide by the decision of a court and not by a compromise where no decision is arrived at. [*Wytecherley v. Andrews*, L. R. 2 P. & D. 327] (3). But here the court passes a decree on the merits of the case, such a person will be bound [*Ibid*, *Retchia v. Malcolm* (1902), 2 Tr. R. 403.] See section 50 (P) § 11.

§ 8. Costs.—See post sec. 10 2 (P).

200. 84 (P)
62 (S)

Payment to-Execu-
tor administrator
before probate or
administration
revoked.

Right of such exe-
cutor or administra-
tor to recoup him-
self

—Where any probate is, or letter of administration are revoked, all payments bonafide made to any executor or administrator under such probate or administration, before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself out of the assets of the deceased in respect of any payments made by

(1) Mortimers 617.

(2) *Ibid*.

(3) Tr. Coote 355, Bro. P. P. 372.

him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

NOTES AND COMMENTARIES.

§ 1. *The Section*

§ 3. *Reimbursement by executor or administrator.*

§ 2. *The principle of protection.*

§ 4. *Payment to administrator obtaining grant by fraud.*

§ 1. **The Section :—**This is with slight verbal alterations section 77 of the English Court of Probate Act 1857 (20 and 21 vic c 77). That act enacts—“where any probate or administration is revoked under this Act, all payments—bonafide made to any executor or administrator under such probate or administration before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator, who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom, probate or administration shall be afterwards granted, might have lawfully made.”

§ 2. **The principle of protection :—**This section affords protection to debtors, making *bonafide* payments to an executor or administrator before revocation of the grant. The scope of the section is limited to debtors only making bonafide payments. It can not be extended to purchasers [*Debendra Nath Dutta v. Administrator General Bengal*, 3 Cal. L. J. 422 10 C. W. N. 673, 1 L. R. 33 C. 713, 10 Bom. L. R. 648, 18 Mad. L. J. 367, 35 L. R. I. A. 109, *Gopal Das v. Budree Dass* 10 C. W. N. 662 12 C. W. N. 802. (P. c)]. The principle is, that, all respect is due to the Judicial Act of a Court of competent jurisdiction, and every person is bound “to give credit to a probate until it be vacated” [*Allen v. Dundas*, 3 T. R. 129]. Thus where payment of money is made to an executor who has obtained probate of a forged will, the debtor will be discharged notwithstanding, the probate is afterwards declared to be null and void (*Ibid*). So where payment is made to a lawfully appointed administrator, though it should turn out that there is a will subsisting and the grant of administration is void. [*Prosser v. Wagner* 1 C. 1 B. N. S. 294]. This is so because if the executor bring a suit against the debtor, the latter can not controvert the title of the executor so long as the probate stands good and there is no reason why the debtor should wait for a suit, when it is known he has no defence. Payments made to such executors, therefore, are protected by the Court (1).

See *ante* sec. 59 (P)

§ 3. **Reimbursement by Executor or Administrator :—**But this section does not protect purchasers [See *Debendra Nath Dutta v. Administrator General of Bengal* 3 C. L. J. 422, 10 C. W. 673]. Nor it seems, a specific legatee is secure in his possession even after the thing specifically bequeathed has been transferred to him by the executors after probate and assets. For if in

(1) Wms 597, 598, Walker and Elg. 105, 106.

such a case, a codicil be found revoking the previous gift and bequeathing the same legacy to another person without changing the executor, in consequence thereof, the probate is revoked and a fresh grant made, that another person will be entitled to recover the legacy with mesne income from the first legatee [*In re West; West v. Roberts*, (1909) 2 Ch. 180] see [*Hawsar v. Shelly* (1913) 2 Ch. 384] and the cases noted in § section 50 (P) *ante*. [*In Pandit Prayag Raj v. Gokaran Pershad Tewari* (6 C. W. N. 787)], a widow was held entitled under the second clause of this section, to reimburse herself out of the assets of her deceased husband's estate in respect of payments made by her while acting under a probate which was consequently revoked [See *Dowse v. Cone* 3 Bing. 20] (1).

§ 4. Payments to administrator, obtaining grant by fraud :—See also *ante* Sec. 50 (P) § 13. All payments, made bonafide by any person to one who has obtained letters of administration, to the deceased's estate are valid and binding, irrespective of the validity of such letters [See *Ambica Charan Das v. Kala Chanda Das* 10 C. W. N. 422; also *Pandit Prayag Raj v. Gokaran Pershad Tewari*, *supra*.]

201. 85 (P).—Notwithstanding any thing, herein before contained it shall, except in cases to which the Hindu Wills Act, 1870 applies, be in the discretion of the court to make an order refusing for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

Power to refuse letters of administration.

§ 1. This section is new. There is no section in the Indian Succession Act which corresponds with it. See *supra* sec. 65 (P) last para. The reason why the court is clothed with a discretion to refuse letters of administration, but not to refuse probate seems to be the fact that a person entitled to letters of administration is only marked out by the law which can not know individuals, as Bentham remarked, where as one entitled to probate, that is the executor, is marked but by the choice of the testator. Has not section 190 (8) *ante* any bearing upon this. This section seems to imply that although a Hindu is not bound to obtain letters of administration in case of intestacy, if he should apply for such letters the court has no discretion to refuse to grant the same. In other words, application for letters must be granted for the purpose of representing the deceased. That is to say, where application is made no discretion would be observed between a Hindu and Christian so far as court's jurisdiction is concerned.

There seems to be no doubt as to the fact that letters of administration in case of intestacy is contemplated by this Section.

The object of the section, seems to be, to guard against frivolous application made not for any bonafide purpose of administering the deceased's

estate but for the purpose of harassing co-heirs. Sir Whitley Stokes says "as it is apprehended that in some cases of family funds a person entitled to a trifling share of the deceased's estate might apply for administration merely for the purpose of harassing his co-heirs by compelling them to apply a full discretion, has been reserved to refuse for reasons recorded, to grant any application" (1). But it may be remarked that it is not easy to see why Hindus among whom family funds are most prevalent, have been exempted from the operation of the section. Again, Hindus do not necessarily require letters of administration for representing a deceased.

Court's duty, where no assets :—under sec. 64 (P) *ante*, petition for grant of letters is to contain a statement showing the amount of assets that are likely to come to the hands of the petitioner (See Sch. III Court Fees Act as amended by Act XI of 1899) and under section 19 of the Court Fees Act added to by Act XI of 1899 an enquiry is to be made by the collector as to the value of such assets. This being so, the question naturally suggests itself what the court must do, where it finds, there are no assets for being administered E.

It Seems, the answer is, it must refuse to make any grant. [*Lalit Chandra Choudhury v. Boikunta Nath Choudhury* (1910) 14 C. W. N. 463, 15 Cal. L. J. 305, *Kalidas Mukherjee v. Nritya Gopal Mukherjee* (1910) 14 C. W. N. cclii, *Re Nursing Chandra Bysack* 3 C. W. N. 635]. But this answer is not quite consistent with the fact as held in *Re Aarou Sholome Gabboy*, [3 C. W. N. 364; 26 C 408] that an administration bond is not to be dispensed with even, where there is no property to be administered (See 78 (P)). 6 course, there is nothing to prevent the application from being rejected where the deceased's estate has already been fully-administered. [*Lalit Ch. Chaudhury v. Baikunta Nath Chaudhury*, *supra*].

Where grant refused :—Where a legatee with secret instructions to carry out some trust claims as universal legatee without disclosing the trust and suppressing these instructions, with the evident intention of retaining the estate himself, the court will refuse the grant [*Loris Kunha v. Coelho* I. L. R. 31 M. 187 18 M. L. J. 158. See in *re. Maddock v. Llewelyn v. Washington* (1902) 2 Ch. 220 at 230, 231].

202. $\frac{86}{263}$ (P) (s).—Every order, made by a District Judge or District Delegate by virtue of powers thereby conferred upon him, shall be subject to appeal, to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals.

Appeals from orders of District Judge.

NOTES AND COMMENTARIES.

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| § 1. "Every order." | § 4. Appeal to Privy Council. |
| § 2. Where appeal does not lie to the High Court. | § 5. Reference to High Court. |
| § 3. Where appeal lies to High Court. | § 6. "Hereby." |

§ 1. "Every order."—It is not that any order which might be made in a probate case either for the attendance of a witness or for the production of a document or any other interlocutory order, may be made subject, *per se* of a regular appeal to the High Court. The words "Every order made by a District Judge" are evidently controlled by the concluding words "under the rules contained in the Code of Civil Procedure" [*Brojo Nath Pal v. Dasmony Dasee* 2 C. L. R. 589, *per Garth C. J.*]; so that this section (read with section 53 (P) *ante*) seems to allow an appeal to the High Court only in cases in which an appeal is allowable under the Code of Civil Procedure [*Khettramoni Dasi v. Shyama Churn Kundu* I. L. R. 21 C. 539.]

It must be remembered however, that the word "order" in this section does not necessarily mean such an order only, as is referred to in section 588 of that Code [*Sheik Azim v. Chandra Nath Namdas* 8 C. W. N. 748. *Rangini Dasi v. Debendra Narain Dasi Singha*, 8 C. W. N. cc viii]. In *Narain Chandra Sen v. Saudamini Dasi* [11 C. W. N cc xi], it has been held that an appeal lies under this section, against every order passed by a Probate Court, purporting to act under this Act, although there is nothing in the Act, authorizing such act. Thus where a District Judge ordered the executor to pay Rs. 1000 to the testator's heir for repairing his family dwelling house which he (executor) had neglected to repair it was held by the Chief Justice that, although there is nothing in the act authorizing the District Judge to pass any such order an appeal lay to the High Court (*Ibid*). So it has been held by the Allahabad High Court that the order of the District Judge, granting or refusing probate, is a decree within the meaning of sec. 2 Civil Procedure Code (1908) and is therefore Appealable [*Eva Mount Stephens v. H. Garnett Orme* (1913) 35 A. 448].

§ 2. Where appeal does not lie to High Court :—It has been held that no appeal lies against an order refusing to make a person opposing probate, a party defendant to an application for probate [*Khettramoni Dasi v. Shyama Charan Kundu*, *supra*, *Abirunnissa Khatoon v. Komurunnisa Khatoon* I. L. R. 13 C. 1000, *Karman Bibi v. Misri Lal* I. L. R. 2 A. 904]. For the same reason an appeal does not lie against an order, refusing a caveator to oppose an application for probate on the ground that he has no locus standi [*Prosad Narain Singh v. Dulhin Genda Keer* (1913) 18 C. L. J. 612.]

So an order re opening a probate case and suspending probate, for a time certain, is not appealable [*Brojo Nath Pal v. Dassmony Dasee*, *supra*]. There is no appeal against order of a District Judge as to security on the ground of insufficiency of such security [*Lucas v. Lucas*, I. L. R. 20 C., 245] or one calling upon the executor to furnish security [*Rangini Dasi v. Debendra Narain Singh*, *supra*], nor any against an order refusing to amend an order in the form of the probate [*Girindu Kumar Das Gupta v. Rajeswari Roy*, I. L. R. 27 C., 51]. So there is no appeal against an order assigning a bond under section 79 (P) *supra* [*Sheik Kalimuddin v. Mahurni* (1912) 15 C. L. J, 382, 39 C. 563]. Under the Bombay Civil Courts Act (XIV of 1869) if the subject matter of the suit does not exceed Rs. 5000, an appeal against the order of an Assistant Judge in that Presidency, will lie to the District Court, and not the High Court [*Laxmi v. Aba*, 32 B. 634].

§ 3 Where appeal lies to High Court :—But an order admitting the caveator as a party (Resp'd.), is appealable, because the position occupied by the respondent, is clearly that of a defendant under the Code of Civil Procedure [*Abhiram Das v. Gopal Das* I L. R. 17 C., 48]. So an order,

deciding that a person has no locus standi is appealable, the reason being such an order results in dismissal of the suit and becomes a decree. But an order deciding the other way that is, holding that a person has locus standi is not appealable, there being no provision in the Civil Procedure Code (V of 1908) for appeal in such a case [*Lakhi Narain Shaw v. Multan Chand*, (1912) 17, Cal. L. J. 230 16 C. W. N. 1099].

Although, this section is placed before section (90) an order made by a District Judge granting permission to dispose of immoveable property under the latter section [*Uma Charan Das v. Mukto Keshi Dassi*, 5 C. W. N. 443, I. L. R. 28 C. 149, dissented from in *Kalimuddin v. Mahurni* (*Supra*)] and an order granting remuneration for preparing a list of the properties left by a deceased person [*Madhavrao Yeshwant v. The Nazir* 2 Bom. L. R. 798] are appealable.

There is an appeal under the Letters Patent from the decision of a single Judge of a High Court on appeal from the order of a District Judge, granting probate [*Umrao Chand v. Brindaban Chand* I. L. R. 17 A. 475.] See charters of Bengal, Madras, and Bombay High Courts section 15 and Charter of N. W. P. High Court section 10.

Appeal to Privy Council :—An order of the recorder of Rangoon rejecting an application for probate is a final decree passed by him in the exercise of original Civil jurisdiction. An appeal from such an order where the estate is of the value of Rs. 10,000, and upwards, lies to the Privy Council and not to the High Court. [*Esoof Hasshim Doophy v. Fatima Bibi* I. L. R. 24 C. 30, I. C. W. N. 8.] See Charters of Bengal, Madras and Bombay High Courts Sec. 39 and Charter of N. W. P. High Court Sec. 30.

§ 5. Reference to High Court.—An order made by a District Judge on an application for probate not being a final order can be referred for the opinion of High Court under sec 617 of the Code of Civil Procedure (Act. XIV. of 1882). But the High Court may, under certain circumstances entertain such an application as a court of concurrent jurisdiction under the next following section [*In bonis Manohor Mukerjee* I. L. R. 5 C. 756. 6 C. L. R. 228].

Where the Judicial Commissioner, refused to amend a clerical error in the form of probate, the High Court dealt with the case under section 622 of the Code of Civil Procedure Code [*Girindra Kumar Das, Gupta v. Rajeswori Roy*, I. L. R. 27 C. 5].

§ 6. "Hereby"—The word "hereby" means "by the whole Act" and not merely by the chapter in which section occurs [*Uma Charan Das v. Mukta Keshi Dasi*, *Supra*].

203. 87 (P)
264 (s).—The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all powers conferred upon the District Judge.

Concurrent jurisdiction of the High Court.

NOTES AND COMMENTARIES.

“High Court”—‘High Court’ in this section does not mean a High Court, as defined in the General Clauses Act, that is the Highest Court of appeal. In other words, the expression is not intended merely to be confined to the High Court in its Appellate Jurisdiction, but it also includes the High Court exercising Original Jurisdiction. It is the High Court exercising Original Jurisdiction that has concurrent jurisdiction with the District Judge for the purpose of exercising the powers conferred by this Act [*In the goods of Mohendra Narain Roy* 5 C. W. N. 377]. So that it has jurisdiction to grant letters of administration on the original side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal, in other words the High Court has jurisdiction in all Districts and it is not necessary that any portion of the property, should be within the limit of the original Jurisdiction of the High Court [*Nagendra Bala Debi v Kashipati Choudhury* (1909) 37 C. 224].

As a Court of Concurrent Jurisdiction, the Calcutta High Court dealt with the case of *In bonis Monohar Mukherjee* [I. L. R. 5 C. 756, 6 C. L. R. 228] as an original application.

CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

204. 88 (P). - An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death as the deceased had when living.

In respect of causes of action surviving deceased, and debts due at death.

NOTES AND COMMENTARIES.

§ 1. *The Section.*
§ 2. *Preliminary.*

§ 3. *Cause of action.*
§ 4. *"That survive the deceased."*

§ 1. **The Section.**—This section declares, (a) the power which an executor or administrator, is entitled to exercise for purpose of suing upon such causes of action as survive the deceased, and recovering such debts as are due to him at the time of his death, and (b) that such power is equal to the power which, the testator or intestate might himself have exercised in these respects, if he had been living.

§ 2. **Preliminary.**—By virtue of section 4 (P) *ante*, all the property of a deceased person, vests in the executor or administrator as such; and after the grant of administration, the interest of an administrator in that property is equal to that of an executor. Such property includes realty, as well as personalty, or immoveable and moveable property and as real property consists of property *in possession* or *in expectancy* (1), so personal property may exist *in possession* or *in action*. This section treats of property *in action*, which is a thing of which a man has not the possession or actual enjoyment, but has a right to demand by action or other proceeding. This is termed "*a chose or thing in action*" (2).

It seems the words "*chose in action*" are equivalent to the term "*actionable claim*", which is defined to mean "a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property or to any beneficial interest in moveable property, not in the possession, either actual or constructive, of the claimant, which, the Civil Courts recognize as affording grounds for relief whether such debt or beneficial interest be existent accruing conditional or contingent" (3). Choses in action include "stocks bonds, evidence of indebtedness policies of insurance, payable to him (the deceased) or to his representative rents, accruing, but not collected, during his life time; dividends and interests, falling due on

(1) See Sec. 106 (8) P. 279 *ante* F. note.

(2) Wms. pp. 4, 9, 57; Wharton L. Lex; Wms. 790.

(3) Act IV of 1882 (Transfer of Property Act) Sec. 180 as amended by sec. 2 of Act II of 1900.

specific legacies during his life time deposits in banks in his name interests in patents and copy rights and generally all debts, demands and obligations due or owing to him at the time of his death and whether absolute or contingent" (1).

§ 3. Cause of action.—The words, '*cause of action*,' have been variously defined and discussed in England and in this country and the difficulty of defining the expression has been increased by its having been used in different senses in different places. In fact, the words do not seem to admit of any clear, accurate, and comprehensive definition. "The words *cause of action* may have either the restricted sense of immediate occasion of the action or the wider sense of necessary conditions of its maintenance. In the one sense it is the mere matter of fact—the failure of the defendant to do or forbear from doing, to give, or make good that which the plaintiff's right entitles him to insist upon. In the other, it is this matter of fact *plus* the right resident in the plaintiff. Failing the former, an injury is inconceivable; failing the latter, the right cannot assume the special shape of an action [Holloway J. in *De Souza v. Coles*, 3 M. H. C. R. 384].

Premising as above, Mr. Justice Holloway expressed himself in these words: "On principle, therefore, and on authority, English and Roman, I take it to be abundantly clear that in actions arising from obligations it is the obligation and its breach which are together the cause of action." This obligation is either, *ex contractu* and *quasi ex contractu* or *ex delicto* [*De Souza v. Coles*, *supra*]. The result of the authorities on the subject according to that learned Judge is, "that the cause of action is composed of all the material matters of fact, requisite to the establishment of the right which has been infringed." [*Ibid*; see *Pattaravy Mudali v. Andimula Mudali*, 5 M. H. C. R. 419; *Rajendra Ram v. Sama Ram*, 1 M. H. C. R. 436 and the observations of Field J. in *Kalidhan Chatterjee v. Shib Nath Chatterjee*, 11 C. L. R. 57 at pp. 62-70]. The words "cause of action," have been defined by Lord Esher, M. R., in *Read v. Brown* [L. R. 22 Q. B. D. 128] to mean "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. The term does not comprise, every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." These are perhaps the best definitions of the expression. [See *Salima Bibi v. Sheik Muhammad*, 1 L. R. 18 A. 131]. According to Mr. Justice Markby, the expression "cause of action," so far as this section is concerned, means simply the right to bring an action [*Chandra Mohan Dutta v. Biswamber Laha*, 1 B. L. R. O. C. 42]. See also L. R. 22 Q. B. 128 & 131, *Read v. Brown*, L. R. 15 I. A. 156, *Chand Koer v. Pertab Sing*.

§ 4. "That survive the deceased."—See next section.

205. ^{268 (S)} (P)

Demands and rights of suit of or against deceased survive to and against executor or administrator.

to prosecute or defend any suit or other proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault

as defined in the Indian Penal Code or other personal injuries not causing the death of the party and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

Illustration.

A Collision takes place on a railway in consequence of some neglect or default of the officials and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having instituted any suit. The cause of action does not survive.

NOTES AND COMMENTARIES.

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| <p>§ 1. <i>What rights and liabilities survive.</i></p> <p>§ 2. <i>Contracts which do not bind the executor or administrator.</i></p> <p>*§ 3. <i>Actions on tort.</i></p> | <p>§ 4. <i>Personal injuries not causing the death of the party.</i></p> <p>§ 5. <i>"Except causes of action for defamation, &c."</i></p> <p>§ 6. <i>Miscellaneous cases.</i></p> |
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§ 1. What rights and liabilities survive :—An executor or administrator so completely represents or stands in the place of the testator or intestate, with respect to the rights and liabilities of the deceased, that all rights of action founded upon "any obligation, contract, debt, covenant or other duty," which the testator or intestate might have sued or been sued upon, survive his death and devolve upon his executor or administrator (1). That is to say, an executor or administrator is answerable as far as, there are assets, for debts of any description due from the deceased, either debts, of record or debts, due on special contract, as for rent or on bonds, covenants and the like under seal; or debts on simple contract as notes unsealed and promises not in writing either expressed or implied. And as regards promises and contracts of the deceased, the rights and liabilities of the executors or administrators arise even if they are not named in any terms embodied in them; "for the executors or administrators of every person are implied in himself" [Lord Macclesfield, in *Hyde v. Skinner*, 2. P. Wms. 197] (2). Thus if money be payable to B. without naming his executor, yet his executors or administrator will be entitled to bring an action for it (3). So where it was agreed that a person would be liable, provided a certain notice in writing were given to him it was held sufficient that the notice was given to his executors though there was nothing to show that it was to be given to them [*Harwood v. Hilliard*, 2 Mad 268] (4). See sec 437 Civil Procedure Code.

To the same effect is section 37, para 2 of Act IX of 1872 (The Indian Contract Act) where it is provided that "promises bind the representatives of the promisors in case of the death of such promisors before performance unless a contrary intention appears from the contract."

(1) *Shep. Touch.* 481, 482; *Wms.* 792, 1728; 8th edn, 604-605, 10th edn, *Walker and Elg.* 122, 217.

(2) *Wms.* 1347, 10th edn.

(3) *Wms.* 796 1730.

(4) *Walker and Elg.* 217.

Thus where a member of the Talabda Koli caste of Hindus, by an express promise to settle his property upon the boy, induced the parents of the defendant to give him their son in adoption, but died without having executed such settlement, it was held that the equity to compel the heir and legal representatives of the adoptive father specially to perform his contract survived [*Bhola Nahana v. Prabhu Hari*, I. L. R. 2 B. 67]. So negligence by a solicitor is a wrong arising out of a breach of duty to be performed and action for damages for such negligence survives even after the death of the solicitor and may be brought against his executor [*Davies v. Hood*, 88 L. J. 19 *Wilson v. Tucker*, 3 Stark, N. P. C. 154]. Similarly the right of Pre-emption under Mahomedan law does not abate at the preemptor's death, but it survives to his executor or administrator under this section [*Sayyad Jiaul Hussain v. Sitaram Bhan* (1911) 36 B. 144, 13 Bom. L. R. 1040].

Implied Contract :—An executor is liable upon implied contract as upon on express one, where for instance, a testator while on a visit to a friend, died at malignant fever and the furniture was destroyed under medical advice to prevent infection and the friend was obliged to leave the house, it was held that the testator's estate was liable to make good the loss and the payment made by the deceased's executor was allowed, [*Shallcross v. Wright*, 12 Beav. 558].

"The general rule is that the representatives of a deceased debtor are liable to the extent of the assets which come to their hands upon all contracts of the deceased undischarged at his death. If the work to be done under a contract is of an ordinary character so that it must be a matter of indifference by whom it is done, performance of it by a person appointed by the promisor is equivalent to performance by him. But where the Act to be done can be done only by the promisor the obligation is necessarily discharged by his death. And this is so in the case where the skill or character or any personal qualities of the promisor are necessary to the performance of the promise" [*Toomey v. Rama Sahai* I. L. R. 17 C. 115]. Accordingly contracts of agency are discharged by the death of the principal, contracts of partnership by the death of a partner, contract by a master to instruct his apprentice by the death of the master and contracts between master and servant by the death of master or servant [*Farrow v. Wilson* I. L. R. 4. C. P. 744] (1)

An executor's suit for probate, abates by his death his right not surviving to his widow [*Sarat Chandra Banerjee v. Nanimohan Banerjee* 36 C. 799.]

§ 2. Contracts which do not bind the executor or administrator :—Generally speaking, where the contract is merely personal to the testator or intestate or where it involves personal skill ability or character [*Toomy v. Rama Sahi* 1889 I. L. R. 17 C., 115], no liability attaches to the executor or administrator, unless a breach is incurred in the life time of the deceased. "The executor's" observes Parke B. [*Wills v. Murry*, Exch. 866] "are in truth contained in the person of the testator, with respect to all his contracts, except indeed in the case of a *personal* contract, that is, a contract depending on personal skill, in which, is always implied the condition, that the person is not prevented by the act of God from completing the work" "[*See Mohendra Nath Mukherjee v. Kali Prosad Johuri*, I. L. R. 30 C. 265] (2). Thus if an author undertakes to compile a work and dies before completing it, his executors are discharged from this contract, because, the undertaking is

(1) See Wms. 796 F. N.

(2) See Broom's L. M. 907-

merely personal in its nature and by the contractor's death, its performance has become impossible. But if there be a breach during the author's life time, the case would be otherwise [See *Marshall v. Braadhurst*, 1 Tyrwh 349, 1 C. & J. 403, *Hall v. Wright* E. B. & E. 793]. So a contract to build a light house was considered to be merely personal on the ground of its being a matter of personal skill and ability [*Wentworth v. Cock*, 10 A. & E., 45]. (1)

There is a distinction between a mere authority and a contract, the former being revoked by death, whereas the latter is not determined thereby except as above noticed. Thus where A had agreed with B, that he would sell a picture belonging to B and that if he succeeded in selling the same, B. should pay him 100£, and B. died before the picture was sold, it was held that A could not recover the 100£ from B's executor [*Companari v. Woodburn*, 15 C. B. 400]. Similarly an agent or servant cannot generally speaking, sue the executor of the principal or master, in respect of services as agent or servant after the death of such principal or master. (2).

§ 3. Actions on tort.—As regards actions on tort, it seems subject only to the exceptions herein named, there is no demand or cause of action, for or against, whether, in relation to personalty or realty, that does not survive the deceased; so that, whatever injury or wrong is actionable by or against a person, during his life time, is also actionable after his death, by or against his representatives, *i.e.* executors or administrators. Thus where the testator, (a shebait) failing to realize rents and profits of the estate under his charge, owing to the wrongful interference and opposition of the defendant, had to spend large sums of money out of his own private estate in preserving the trust estate and defending his position as a shebait which had been unsuccessfully challenged by the defendant and also in performing the obligations, imposed upon him by the original testator's will and after his death, his executor claimed those sums with possession of the trust estate it was held that he was entitled to do so in his representative capacity [*Peary Mohan Mukherjee v. Narendra Nath Mukherjee, Raja* (1909) 1 L. R. 37 C., 229, L. R. 37 I. A. 27; 14 C. W. N. 261, 11 C. L. J. 220, 20 Mad. L. J. 171, 13 Bom. L. R. 257; 7 A. L. J. 125].

Executor's liability for rent.—If the whole rent accrue in the testator's life time the suit will lie against the executor in his representative capacity. (3)

But in an action for rent, accruing after the death of the lessee (the testator) if the executor enters upon the demised premises, the lessor has his election either to sue him personally as assignee, in possession in respect of the perception of the profits. If the executor does not enter, he is still chargeable as executor.

The principle upon which an executor may be made personally liable for rent, which has occurred due after the death of the lessee, is this that if the rent be of less value than the land (as the law prematific suppose) so much of the profits, as suffices to make up, the rent, is appropriated to the lessor and can not be applied to anything else.

This principle was applied by Mr. Justice Mukherjee in [*Maharaja of Burdwan v. Parbutty Charan Mukherjee* (1911) 15 C. L. J. 458] where it was

(1) Wms. 1732; Walker and Elg. 220, Fry's Sp. P. 85.

(2) See Wms. 1734; Walker and Elg. 220.

(3) Weirs 1388—1390, Wm. Edn. *Ibid* 1390—1391.

held that the executor was personally liable for rent which had occurred due after the death of the lessor.

§ 4. “Personal injuries not causing the death of the party.”—This must be read and considered with the provisions of Acts XII and XIII of 1855.

Act XII of 1855, gives to the executors or administrators of a deceased person, right to sue for any wrong committed in his life time, which has occasioned pecuniary loss to the estate of the deceased, and for which wrong an action might have been maintained by such person, provided such wrong shall have been committed within one year before his death. It further provides subject to a like proviso, that an action may be maintained against the executors or administrators of any person, deceased for any wrong committed by him in his life time for which he would have been subject to a similar action. (This is in accordance with section 2 Stat. 3 and 4 Wm. IV C. 42) sec. § 6, *infra*.

Act XIII of 1855 which is almost a *verbatum* reproduction of Statute 9 and 10 Vic. C. 93, better known as Lord Campbell's Act or the Fatal Accident Act, purports to enact that, if the “personal injuries” cause the death of a party, where such party could have maintained any action if alive a suit for damages may be brought by the executor or administrator of the deceased as therein provided, with this additional provision that the executor or administrator of the deceased, may assert a claim for and recover any pecuniary loss to the estate of the deceased caused by such wrongful act, neglect, or default, which sum, when recovered, shall be deemed part of the assets of the deceased. It may be noted that the said act XIII does not transfer to the representative the right of action, which, the person killed, would have had “but gives to the representative a totally new right of action on different principles,” [See *Blake v. Midland Railway Co.*, 18 D. B. 93 at 110] and the word “representative does not mean, only executor or administrator, but includes all or any one of the persons for whose benefit, a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian [Johnson v. The Madras Railway Co., 1 L. R. 28 M. 479., 15 Mad. L. J. 363.]

§ 5. “Except causes of action for defamation &c.”—It will appear from the above that an executor or administrator can maintain an action in his representative character only in cases where the estate of the deceased suffers any loss on account of the wrongful act committed by another during his life time. Therefore where the wrong or injury is merely a personal one, as in the case of defamation or assault &c. and no pecuniary loss has been occasioned to the estate of the deceased, no action is maintainable after the death of such deceased. In such cases, the rule of law, embodied in the maxim *Actio personalis, moritur cum persona* (a personal right of action dies with the person) shall evidently apply, subject to the modifications effected by the above-mentioned Acts. This rule is, that, if any injury is done by one person either to the person or property of another for which damages only is recoverable in satisfaction, the action dies with the person by whom the wrong is committed (1). Thus an action for deceit will not lie against the representatives of a person who has fraudulently induced another to take shares in a company [Peck v. Gurney (1873) L. R. 6 H. L. 377] or, even to purchase shares from the deceased himself [Re Duncan; Terry v. Sweeting (1899) 1 Ch. 387].

(1) See Wms. 796, 1735, Walker and Elg. 122; Pollock's Torts 55, Broom's L. M. 909—15.

"Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate" [*Lord Ellenborough in Chamberlain v. Williamson*, 2 M. and S. 408] (1). But this rule "was never extended to such personal actions as were founded upon any obligation contract, debt, covenant or any other duty to be performed; for there the action survived" [*Davies v. Hood* 88 L. J. 19]. In all cases therefore, the decision seems to turn upon the question, "Is the injury done, a tort properly so called or is it a wrong arising from breach of contract." A suit for malicious prosecution on plaintiff's death survives to his legal representatives. The words "other personal injuries" refer—physical injuries to the person which do not cause death [*Krishna Behari Sen v. The Corporation of Calcutta* 8 C. W. N. 745; I. L. R. 31 C. 993.]

§ 6. **Miscellaneous cases.**—In a suit to recover the value of an elephant wrongfully sold by the defendant's husband, it was *held*, that Act XII of 1855 did not apply to the case, because, here, plaintiff's right of suit survived against the defendant independently of that act and the

Act XII. of 1855. defendant was liable to make good the loss as heir of her husband. Act XII of 1855 relates only to wrongs which do not survive to the representatives of a deceased person [*Chandramonee Dassee v. Santomonee Dassee* 1. W. R. 251; see also *Nujuff Ali v. Patterson* 2 N. W. P. R., 103]

Where the plaintiff, sued one R to recover damages for wrongful arrest and malicious prosecution, and R died during the pendency of the suit, it was *held* that Act XII of 1855, did not apply to a suit, such as this, brought originally against the wrongful-doer himself, and subsequently sought to be continued against his heir. That Act relates only to suits brought against the representatives of a deceased person for a wrong committed by the latter in his life time. It was further held, following *Phillips v. Homfray* [L. R. 24 Ch. D. 439] and *Peck v. Gurney* [L. R. 6 H. L. 377], that the cause of action did not survive as the estate of the deceased was not benefited by the wrong [*Haridas Ramdas v. Ramdas Mathuradas* 9 L. R. 13 B. 677]. *Rambhode Das v. Rukmany Bhoy*, I. L. R. 28 M. 487, see *Krishna Behari Sen v. The Corporation of Calcutta*, *supra*].

Where the plaintiff brought an action for damages against a wrong-doer for refusing to give up the keys of a certain temple, the plaintiff being entitled to such keys as the manager of the temple and the wrong-doer died pending suit, it was *held* that the cause of action did not survive against the representative of the deceased, there being no finding that the deceased left any personal estate and the wrong complained of being a personal one, not benefiting his estate [*Satagopa Ramanuja v. Mahabir Dassje* 8 Mad. L. J. 180].

Where a Hindu Minor governed by the Mitakshara law on whose behalf a suit to set aside his father's alienation of ancestral property had been instituted died, it was *held*, that no right to sue survived in favour of his mother but the suit abated. [*Paderath Singh v. Rajaram*, I. L. R. 4 A., 235].

As regards damages under Act XIII of 1855, it has been laid down that, the principal matter to be considered estimating such damages is, whether the deceased, if he had lived, would have been a substantial support to the plaintiff. Distinct evidence of the loss sustained or benefit expected is not necessary. No sum can be awarded in respect of funeral expenses, whether for removal or disposal of the body or for outlay for ceremonial or obsequial purposes [*Narayan Jetta v. Municipal Corporation of Bombay* 16 Bom. 254]. [See *Kalidas Mukherjee E. I. Ry. Co.*, 2 C. W. N. 609; reversed in *E. I. Ry. Co. v. Kalidas Mukherjee*, I. L. R. 28 C. 401, see also *Vinayak Raghunath v. G. I. P. Ry. Co.* 7 B. H. C. R. O. C. 113; *Rattanbai v. G. I. P. Ry.*, Co. 8 B. H. C. R. 6 C. 130; *Lyell v. Gangadai*, I. L. R. 1 A. 60, *Narayan Jetta Municipal Corporation of Bombay, Supra*].

In a suit for recovery of possession of minor children wrongfully detained by the defendant, it was held that the right of suit, did not survive against the defendant's representatives, the maxim actio *personalis moritur cum persona*, applying to the case. [*Shorifa v. Munebban*, I. L. R. 25 B. 574].

Where the suit was one for injunction and damages for encroachment upon immoveable property and order was made by consent that the defendant was to purchase the plaintiff's interest in that property and pay her the price to be settled by certain referees; and the plaintiff died after the referees had ascertained the price; it was held that the right to sue survived to the plaintiff's representatives [*Chooney Money Dassee v. Ram Kinkar Dutt*, I. L. R. 28 C., 155].

Suits for accounts which the testator was liable to render, may lie against Executor or Administrator on the lines as pointed out in the case of *Kumodini Bala v. Asutosh Chatterjee*, 16 C. L. J. 282. The reliefs claimed will be only of a limited character; no relief so far as it was personal against the testator can be claimed or granted.

206. 90 (P)
269 (S)

Power of executor
or administrator to
dispose of property.

—(1) An executor or administrator has subject to the provisions of this section power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.

(2). The power of an executor to dispose of immoveable property, so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the court which granted the probate permits by an order in writing, notwithstanding the restriction to dispose of any immoveable property specified in the order, in a manner permitted by the order.

(3). An administrator may not, without the previous permission of the court by which the letters of administration were granted.

(a) mortgage, charge, or transfer by sale gift exchange, or otherwise, any immoveable property for the time being vested in him under section 4. (See *Pandit Prayrag Raj v. Gaukora Pershad Tewari* 6 C. W. N. 787) or

(b) lease any such property for a term exceeding five years.

(4). A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may, is voidable at the instance of any other person interested in the property.

(5). Before any probate or letters of administration is or are granted under this Act there shall be endorsed thereon or annexed thereto, a copy of sub sections (1) (2) and (4) or of sub-sections (1), (3) and (4), as the case may be.

(6). A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by the last foregoing sub-section not having been made thereon or attached thereto, nor shall the absence of such endorsement or annexure authorize an executor or administrator to act otherwise than in accordance with the provisions of this section.

NOTES AND COMMENTARIES.

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| § 1. <i>The section.</i> | § 9. <i>"Restriction."</i> |
| § 2. <i>General remarks.</i> | § 10. <i>Jurisdiction of the Court under the section.</i> |
| § 2. (a) <i>Nature of the powers conferred by the section.</i> | § 11. <i>"Persons interested in the property."</i> |
| § 3. <i>Stages of the powers of executors</i> | § 12. <i>Who can apply for permission.</i> |
| § 4. <i>"Power to dispose."</i> | § 13. <i>Disposal invalid, made valid.</i> |
| § 5. <i>Power to sell.</i> | § 14. <i>Executor's discretion.</i> |
| § 6. <i>Power to mortgage.</i> | § 15. <i>Executor's power to borrow money.</i> |
| § 7. <i>Notes from English authorities.</i> | § 16. <i>Miscellaneous.</i> |
| § 8. <i>Disposal in contravention of this section, effect of.</i> | |

§ 1. The section.—This section, as it now stands, differs very materially from section 269 of the Indian Succession Act which corresponds with it. That section runs as follows :—

“An executor or administrator, has power to dispose of the property of the deceased either wholly or in part in such manner as he may think fit.”

Section 90, as it originally stood, enacted that,

“An executor or administrator has power with the consent of the Court by which the probate or letters of administration was or were granted to dispose of the property of the deceased either wholly or in part in such manner as he thinks fit :—

Provided that the Court may, when granting probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased.”

The present section was substituted for the original one by section 14 of Act VI of 1889 (The Probate and Administration Act 1889).

The marked difference between the powers conferred upon executors and administrators by the Indian Succession Act and the Probate and Administration Act, is due to the fact that the Legislature, deemed it unsafe to entrust to an executor or administrator in the maffasal “the full powers conferred by the Succession Act.” (1).

As to the powers of one of several executors, and administrators. See section 92 (P) post.

§ 2. General remarks.—As regards the powers of an executor or administrator, the general rule is that, he has an absolute power of disposal over the whole property of the deceased, and that such property can not be followed by his creditors into the hands of the alienee ; the principle being, that the executor or administrator must sell in order to discharge his duty as an executor or administrator, e. g. in paying debts and so forth, and that, “It would be monstrous if it were otherwise, for then no one could deal with an executor” should be liable afterwards to be called to account. [*Whale v. Booth* 4 T. R. 625—Per Lord Mansfield] (2).

It is this absolute power which has been conferred by the Legislature upon executors or administrators under the Indian Succession Act ; and so far as moveable property is concerned, it seems, the same power has been given to them by the Probate and Administration Act. Section 90, as it originally stood, by the words “with the consent of the Court” ; restricted the power of executors and administrators, both as regards moveable and immoveable property. But by the present section, this restriction has been removed in respect to the disposal of moveable property. It has relation, now, it seems, only to immoveable property. See however, §§ 5 & 10, *infra*.

The general principle is, as it has already appeared, that after the grant of administration, the power of an administrator is equal to that of an executor.

(1) See the speech of Sir Whiteley Stokes on the occasion of his presenting the Report of the Select Committee on the Bill for the Probate and Administration Act.

(2) Wms. 936-37 ; Walker & Elg. 148.

But by this section, an innovation seems to have been introduced into the principle. It is now provided that such power, so far as the disposal of immoveable property is concerned, is not the same in both, the executor's power being subject to a restriction of one character and that of an administrator to that of a different character. An administrator whether with or without will, has, in fact, in respect to his power of dealing with immoveable property, been reduced to the level of a manager under the Guardians and Wards Act of 1890 (Act VIII of 1890)—nay, even lower than that.

Note :—This, it may be submitted, is some what, anomalous. An universal legatee, having absolute power of disposal, under the terms of the will, after he has taken out letters of administration, is to have almost, the same power as a manager under the Guardians and Wards Act—a manager, who may be a person, having no connection whatever with the deceased. But this is not all; for, in order to obtain such letters, the administrator, is bound in all cases, to execute a bond with such surety as may satisfy the Judge, where as a manager under the Guardians and Wards Act is required to give such bond only “if so required by the court.” (1). This being so, it is not unreasonable to suppose that there may be persons who will feel inclined to suppress their testators will in cases, where they might lawfully claim their properties without it.

§ 2. (a) Nature of the powers conferred by the section :—Under Mohamedan Law :—This section governs the powers of Mohamedan executors, so that, since the passing of this Act, the powers of Mohamedan executors, in cases, in which it applies, are no longer, determined by Mohamedan Law [*Sheik Moosha v. Sheik Essa*, 8 B. 241]. The remarks of Sir Roland K. Wilson are however, very suggestive. He says “A Mohamedan testator, would naturally assume that the powers of his executor, would be limited by the general rules of his personal law, unless he enlarged them by express words and therefore the court would in most cases be giving effect to his real intentions by treating the restrictions imposed by the law as being virtually imposed by the will. The Legislature can hardly have intended that a Mohamedan executor without probate, should be able to make at his own will and pleasure, dispositions which are altogether for bidden by his own personal law and which are only permitted with the consent of the court by the general statute law to an executor with probate” (2).

The powers, contemplated by this section are those, that are or may be exercised by executors or administrators as such. It has nothing to do with the powers of a beneficiary or legatee. Where, for instance, A, bequeaths his properties to B. for life, with a direction to pay his debts and apply a specific portion thereof, to the management of a deb-sheba, B, being a beneficiary so far as his life interest is concerned, may dispose of that life-interest, without any permission by the court. But if B, is required to transfer any property to pay the debts of his testator, or to do any other act in the discharge of his duties, as an executor it is necessary that he should obtain the court's order sanctioning such transfer, unless the testator himself authorized it by his will. Thus probate or letters, do not effect the rights of any person beneficially interested in the estate [*Joges Chandra Chuckerbutty v. Mohim Chandra Saha*, 11 C. W. N. CCXIX].

(1) Act VIII of 1890 (The Guardians and Wards Act) Sec 34 (a).

(2) Anglo M, L. 264.

§ 3. Stages of development of the powers of executors.—The development of the powers of Hindu Executors for the disposal of the properties of the deceased, may be divided into the following stages :—

1st. **Previous to the passing of the Hindu Wills Act :—**In this stage the powers of executors beyond the jurisdiction of the Presidency towns, not being under the control of any Legislative enactment, were held to be equivalent to those of managers of estates only, subject of course to the directions in the will [*Sharo Bibi v. Baldeo Dass*, 1 B. L. R. O. C. J. 24 ; see section 4 (P) § 6 ante]. Their power to sell or mortgage was thus identical with what is defined in *Hunnooman Persad Panday v. Musst Babooee Munraj Koonwaree* [6 Moo. I. A. 393].

2nd. **After the passing of the Hindu Wills Act, but before that of the Probate and Administration Act :—**In this period, executors appointed by such wills as came within the operation of the Hindu Wills Act, acquired the same powers and interest in the property of their deceased testators as obtained under the English law [*Sheik Moosha v. Sheik Essa* I. L. R. 8 B. 241 ; *Administrator General of Bengal v. Prem Lal Mullick* I. L. R. 21 C. 732 at 757, 759 ; I. L. R. 22 C. 788 at 796] see section 4 (1) § 6 ante.

3rd. **Under the Probate and Administration Act, 1881.**—By this Act, the powers of Executors, were considerably reduced as it appears from the provisions of section 90 of that Act (see *supra*).

4th. **Under the Probate and Administration Act 1889.**—Section 14 of this Act, repealed the old section 90 and substituted for it, the section under notice, which is now the foundation of all powers of executors and administrators for the purpose of disposing of the properties of the deceased.

§ 4. "Power to dispose."—These words include transfer by way of sale, mortgage, charge, exchange or lease. They include a power of gift also ; but such a power would apparently be dependent upon the consent of the beneficiaries, [*The Eastern Mortgage and Agency Co. v. Rehati Kumar Roy*, 3 Cal. L. J. 260 at 266.]

§ 5. Power to sell.—An executor, is in the absence of any restriction imposed by the will, clothed with as full authority to sell, as is given to him by section 269 of the Indian Succession Act ; that is to say, his power to sell, where there is no restriction, is absolute and unqualified, absolute but subject to restrictions imposed by will and is not dependent on the permission of the court so that, he may sell "in such manner as he may think fit," [See *In, re Indra Chandra Singha ; Saraswati Dasi v. Administrator General of Bengal* 1896 I. L. R. 23 C. 580 ; *In bonis Nanda Lal Mullick*, *Ibid* 908], The power of an executor to sell, being subject only to the restriction, imposed by the will appointing him [*In bonis Nando Lal Mullick*, *supra*], this restriction, if invalid, the executor's power, is unrestricted [*Joggoobandhu Dey Podder v. Dwarka Nath Addya*, I L. R. 23 C., 446].

This section, gives the executor merely the ordinary powers of sale that an owner would have, in so far as they are not limited by the will, and as such those powers must be subject to the usual rules of equity. It no way supersedes

section 39* of the Transfer of Property Act (Act IV of 1882). Accordingly, where a testator by his will, gave, his widow's maintenance, out of the income of his immoveable property, subject to a limited power of sale or mortgage, for special purposes, and it was found that a large part of the property was sold by the executrix with the object of defeating the claim of that widow, and that the purchaser was aware of the fraud thus committed, it was held, that the plaintiff, the said widow, was entitled to recover her maintenance out of the property in the hands of the purchaser, irrespective of the possibility of her claim being satisfied from other property. (*Beharilalji v. Bai Raj Bai*, 1898 I. L. R. 23 B. 342). Thus although a *bonafide*—purchaser may be protected, one who acts in collusion with the executor for defrauding a beneficiary can not be protected by this Act (*Ibid*). So this section, is not intended to afford protection to unwarrantable and fraudulent dispositions by an administrator whose title rests on a grant absolutely void [*Debendra Nath Dutt v. Administrator General, Bengal*, 10 C. W. N. 673, 3 Cal. L. J. 422 I. L. R. 33 C., 713, 10 Bom. L. R. 648 18 Mad. L. J. 367, I. L. R. 35 C. 955, 35 L. R. I. A. 109, 12 C. W. N. 802 8 C. L. J. 94.]

Where the executors of a will transfer their interest in the estate of the deceased under section 31 of the Administrator General's Act (Act II of 1874), to the Administrator General, the latter acquires, by such transfer, only such powers of disposition over the estate, as the executors themselves possessed ; so that for the purpose of this section the administrator General is not an administrator but an executor in respect of the properties vested in him by the deed of transfer [*In bonis Nanda Lal Mullick*, I. L. R. 23 C., 908].

Transfer of Executor's interest sec. 31, Act II, of 1874.

Where certain persons who were heirs of a deceased lady and had taken out letters of administration to her estate, limited to certain Government Securities, sold such securities to a *bonafide* purchaser under a written instrument in which the Vendors were not described as, administrators, it was held, that the failure to so, describe themselves did not affect the sale, in as much as they were entitled to sell no more than their own shares in such securities yet, the entire purchase money, having come to their hands, they as administrators, were bound to administer the same, as part of the assets of the estate, the question whether, they did so or not, not being one which would affect the title of the purchaser [*Preo Nath Karar v. Surja Coomar Goswami* I. L. R. 19 C. ; 26 *West of England Bank v. Murch* I. L. R. 23 Ch. D. 138 and *Corser v. Cartwright*, L. R. 7 H. L. 731, followed in principle] (1). In this connection, it may be observed that where a person having several estates and interests conveys all his estates and interests in land, every such estate or interest which may not be vested in him,

* Section 39, provides, as follows:—"Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against transferee, if he has notice of such intention or if the transfer is gratuitous but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

would pass by the conveyance, although such estate or interest did not rest in him in the character in which he professed to convey the land [*Gopal Narain Majoomdar v. Muddomutti Gupte* 14 B. L. R. O. C. 21, *Preo Nath Koror v. Surja Coomar Goswami*, *supra*; *De Silva v. De Silva* 1. L. R. 27 B. 103, *Sooleman v. Rahimtula*, 6 Bom. L. R. 890]. [But see *Pura Sundari v. Bijraj Napani* (1910) 37 C. 362], Sir L. Jenkins C. J. held "it is the true interpretation of the deed, that has to be ascertained" overruling the objection on the basis of the general words whereby the vendors purported to convey "all their estate, right, title interest, claim, and demand in the property." The question turned upon whether one of the vendors, joined the conveyance in the capacity of a sole surviving executor and it was found that he did not do so and that such a contention was opposed to the natural meaning of the deed.

A Hindu widow who has taken out letters of administration, may, under this section validly alienate her husband's property, with the permission of the court, even when there is no legal necessity [*Kamikhya Nath Mukherjee v. Hari Churn Sen*, 1899 1. L. R. 26 C. 607] see however *Vinayakrao v. Vidya Shankor* (1907) 9 Bom L. R. 404]. Thus it seems, a bonafide purchaser or mortgagee is not required to enquire into the necessity for the sale or mortgage *Ibid.* But see *Hunooman Pershad Panday v. Musst. Babooee Munraj Koonwarree*, 6 Mad. I. A. 393, as to such transactions before this Act was passed.

The question, how far lands purchased from a Hindu devisee are liable in the hands of the purchaser for the testator's debts, stands on the same footing, as a similar question under the English Law.—The creditors of the testator may follow his lands into the possession of a purchaser from the devisee, if it can be proved that such purchaser knew (1) that there were debts of the testator, left unsatisfied; and (2) that the devisee to whom, he paid his purchase-money, intended to apply it otherwise than in the payment of such debts. But a purchaser, ignorant on either of these points has a safe title, for no duty is cast upon the purchaser from the devisee, to enquire whether there are any debts of the testator or to see to the application of his purchase money, even when there is an express charge of debts by the testator on the devised estate; and this rule applies with greater force, when the devisee is also the executor

and in such a case, the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase money [*Grindeer Chander Ghose v. Mackintosh*, 1. L. R. 4 C. 897, 4 C. L. R. 194. *Soleeman v. Rohimtula* 6 Bom L. R. 800].

* Doctrine of notice: A notice is thus defined in the Transfer of property Act "(IV of 1882)—A person is said to have notice of a fact which he actually knows that fact or when, but for wilful abstention from an enquiry or search which he ought to have made or gross negligence, he would have known it or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act 1872. Section 229.

[Section 229. Indian Contract Act, provides that "A notice given to, or information obtained by the agent provided, it be given or obtained in the course of the business transacted by him for the principal shall as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal]. This definition, which is reproduced in the Indian Trusts Act (II of 1882) correctly codifies the law as to notice which existed prior to the passing of the Transfer of Property Act. *Churaman v. Balli* (1887) 9 A. 591, 599].

Although, therefore executors, have full power of disposal over their testators estate and generally speaking, neither creditors nor legatees can follow the assets into the hands of the alienee, yet where the alienation is made for purpose foreign to the will as mentioned above and the alienee takes with notice of such purpose, then he is in no better position than the executors, so that the assets can be followed in his hands by creditors as well as legatees [*Golam Hussein v. Bank of Bombay & Sooleman v. Rohimtula* 7 Bom L. R. 407 S. c. Nom. *Bank of Bombay v. Suleman*, 35 L. R. I. A. 130. 5 A. L. J. 661, 12 C. W. N. 993 P. C. ; I. L. R. 33 B. 1, 8 C. L. J. 345, 18 M. L. J. 435]. But see post sec. 140 (P), 10 Bom L. R. 1065 (P. C.).

The principle is "where a person who fills the position of an executor is found selling ~~or~~ mortgaging part of his testator's estate, he is presumed to be acting in the discharge of the duties imposed upon him as an executor unless there is something in the transaction which shows the contrary." This is applicable even where the executor purports to act as a beneficial owner being a devisee himself or where the testator's estate is charged with payments of debts and legacies [*Re Henson, Chester v. Henson* (1908) 2 Ch 356].

§ 6 Power to Mortgage.—An executor's power to mortgage is equal to his power to sell [*Eastern Mortgage and Agency Co. v. Rahati Kumar Roy*, 3 C. L. I. 260. *Child & Co. v. Thorley*, 16 Ch. D. 151], and he may not only mortgage any property of the testator but may also give the mortgagee a power of sale [*Seale v. Brown*, I. L. R. 1 A. 710 F. B.—Stuart C. J. dissenting ; *Russel v. Plaice*, 18 Beav. 21]. But such power of the executor is always subject to the terms of the will. Thus, where certain immoveable property was devised by will upon condition that the devisee who was also an executor, should execute a mortgage of such property to the Official Trustee of Bengal for the time being, to secure the payment of a certain legacy and the devisee, with the intention of giving such effect to such condition mortgaged that property to his executors, it was held that the mortgage, not being in accordance with the terms of the will was invalid. [*Vowghan v. Heseltine*, 1874, I. L. R. 1 A. 753], where, however, such mortgage was made by virtue of the power conferred upon the executor by law, independently of the will, it was held to be valid [*Gopal Narain Majoomdar v. Mudoomutti Gupte*, 14 B. L. R. O. C. 21] see post sec. 140 (P) to 142 (P).

Mr Pomeroy says "notice" may, I think, be correctly defined as the *information concerning a fact actually Communicated to a party by an authorized person or actually derived by him from a proper source, or else presumed by law to have been acquired by him which information is regarded as equivalent in its legal effects to the full knowledge of the facts and to which, the law attributes the same consequences as would be imputed to knowledge* (1). Notice is either actual or constructive but the legal effect of both when established is exactly the same. It is also called express or implied. Actual or express notice is the actual knowledge of a given *fact*, regularly or formerly communicated and constructive or implied notice is a conclusion of law from violent presumption which, the courts will not allow to be controverted (2). The distinction between actual and constructive notice does not primarily, depend, upon the amount of the information, but on the manner, in which it is obtained or assumed to have been obtained. (3). It is to be observed however, that in this country, as it is apparent from the above definition, no such distinction is made between actual and constructive notice as in England, the definition being wide enough to include both. According to the definition constructive notice is that which is imputed to one, by reason of his wilful abstention from enquiry or by reason of his gross negligence or by reason of his agent's knowledge.

(1) Elg. Jur. § 594, 3rd Ed.

(2) Sugd. Ven and Pur. 1040, 1041 ; Coote, most 370.

(3) Pomeroy E. 2 per § 595.

But bare authority to sell does not include authority to mortgage, provided that "The executor shall pay all my debts * * * * if there be any difficulty in paying off the debts from the money, due to me, the executor shall either sell the whole or a portion of any estate or make any other settlement of the estate such as Patni or Durputni, &c., and shall pay off my debts from the consideration-money thus acquired;" it was held, that under this authority given by the testator the executor had no power to mortgage any portion of the testator's estate. [*Kanti Chandra Chattopadhyaya v. Kristo Churn Acharjee* 3 C. W. N. 515; see *Dinomoyee Dassee v. Tara Chand Kundoo*, 1865, 3 W. R. Mis. 7] Similarly, a power to mortgage does not authorize a sale [*Cook v. Dawson*, 29 Beav. 123] (1). But in *Purna Chandrn Bakshi v. Nobin Chandra Gangopadhyaya* [8 C. W. N. 362], it has been held that *Kanti Chandra Chattopadhyaya v. Krishna Churn Acharjee* [*supra*] did not lay down any general rule, so that in the absence of any prohibition in the will, power to sell includes power to mortgage (see Theob 393 5th Edn). According to American authorities, power to sell does not include power to mortgage, no estate being given to the donee of the power [*Parkhurst v. Srumbull* (1902) Mach 90 N. W. 25.]

Where a testator declared by his will that his widow should have full powers, but that during the life-time of his son, then a minor, she should not have power to transfer without any legal necessity any portion of his property; but that she should have power to mortgage the property to pay off Government revenue and to liquidate other debts payable by him; and under this authority the widow, executed a mortgage of part of the family estate to secure the payment of the balance of interest alleged to be due on three previous mortgages which had been executed by the testator in his life time; their Lordships of the Privy Council held, that the will conferred on her no greater power of alienating the family estate than she had under the Hindu law, and that the mortgage executed by her was invalid. [*Tika Ram v. The Deputy Commissioner of Bara Banki*. I. L. R. 26 C., 707; L. R. 26 I. A. 97; 3 C. W. N. 573].

In *Pandit Prayag Raj v. Gankoran Pershad Sewori* [6 C. W. N. 787] a mortgage by an administrator (although probate had been granted to him by mistake without the permission of the Judge, was held to be bad.

Power to pledge :—It seems power to mortgage, necessarily includes, power to pledge goods or moveable property. The restriction, imposed by this section, is not applicable to an executor's, dealing with such property. He can therefore pledge apparently, under section 178 of the Indian Contract Act (IX of 1872) (apart from his power, inherent to his office) as an ordinary person and where he does so, that section applies. But the proviso, to that section does not. For an executor, is in juridical possession of the goods of his testator. On this point Mr. Justice Davar holds that for a transaction to fall within the proviso, it must be established that the fraud or offence was committed by the powers against the lawful owner and that he obtained the goods by means of an offence or fraud perpetrated against that owner. This being so, the proviso is not applicable to the case of an executor where he being in juridical possession of his testator's goods gets them, transferred to himself in order to misappropriate and then in his personal capacity, pledges them with a third party who

has no knowledge of the fraud [*R. O. Sethna v. National Bank of India* (1910) 12. Bom. L. R. 870].

§ 7. Notes from English Authorities.—Under the English law, it is of great consequence that no rule should be laid down which may serve to impede the executors in their administration of the deceased's estate, or render their disposition of such estate unsafe or uncertain to the purchaser. The title of the purchaser is complete by sale and delivery. He is not bound to see the money properly applied, although, he knew he was dealing with an executor "What becomes of the price is of no concern to him." [*Scott v. Tyler*, 2 Dick 725 per Lord Thurlow]. (1)

This observation is equally applicable to mortgages and pledges (*Ibid*). Hence in the absence of fraud, the fact that an executor may waste the money, is not sufficient to invalidate the sale or mortgage [*Whale v. Booth*, 4 T. R. 625] (2) and where there is fraud it must appear that the purchaser or mortgagee participated in it, before the disposition can be rendered invalid, (*Ibid*). In equity, however, an executor or administrator, can make no valid disposition by sale or otherwise of the testator's assets as a security for, or in payment of his own debt on the principle "that the transaction itself gives the purchaser or mortgagee notice of the misapplication and necessarily involves his participation in the breach of duty." [*Scott v. Tyler*, *supra*, *Hill v. Simpson*, 7 Ves. 152] (3). But where the executor himself is a specific legatee, he may effect a sale or mortgage of the specific legacy for the satisfaction of his own private debt, unless it can be shown that the purchaser or mortgagee knew there were debts of the testator unpaid. [*Taylor v. Hawkins*, 8 Ves. 209]. (4)

An executor or administrator has power to endorse a promissory note or bill of exchange made payable to the deceased or his order [*Rawlinson v. Stone*, 3 Wills 1]. (5)

Executor's power—delegation of.—Where a power of sale is given to executors, they can not sell by attorney. The principle is "where a power is given, if a personal trust and confidence, be thereby reposed in the donee to exercise his own judgement and discretion, he can not refer the power to the execution of another." [Combe's case 9 Co. 75, see however *Seale v. Brown* I. L. R. 1 A. 710] (6). There is no distinction between a power given by statute and a power conferred by will [*Jogendra Chandra Dutt v. Apurna Dasi*, 13 C. W. N. 1190.]

If the executor be authorized to sell with the assent of A, and A die before assent, the power of the executor is determined [*Daune v. Annas Dyer* 219 a]

(7). If a mortgage is effected by an executor with the written consent of every beneficiary, it may fairly, be regarded, as in substance a mortgage, by the beneficiaries themselves [*Eastern Mortgage and Agency Co. Ltd. v. Rabati Kumar Roy*, 3 Cal. L. J. 260, *Geyer v. Snyder* (1893) 140 N. Y. 394 and *Duryea v. Mackey* (1896) 151 N. Y. 204 follows].

(1) Wms. 939; Walker and Elg. 150; Hend. 368. See R. B. Ghose's Mortgage, 247, 3rd. Edn.

(2) Wms. 939; Walker and Elg. 152.

(3) Wms. 941; Walker and Elg. 153, Sugd. V. & P. 853, 11th Edn.

(4) Wms. 942; Walker and Elg. 149.

(5) Wms. 947; Walker and Elg. 159.

(6) Wms. 948; Do. Do. 159.

(7) Walker and Elg. 120 F. N.

An executor may in some cases exercise the power of election. If for instance a lease is granted to A for ten or twenty years, as he shall elect his executor may upon his death, make the election. (1)

§ 8. Disposal in contravention of this section, effect of.—As provided in sub-section (4), a disposal of property by an executor or administrator in contravention of the provisions of this section, is voidable only at the instance of any person, interested in the property, and not void *ab initio*, so that, a lease granted by an administrator for a term exceeding five years, is good and valid as between the lessor and the lessee [*Shubhadra Dassya v. Chandra Kumar Nag*, 8 C. W. N. 54. *Eastern Mortgage and Agency Co. v. Rabati Kumar Roy*, 3 Cal. L. J. 260, *Sarbesb Ch. Basu v. Hari Doyal Singh* (1909) 14 C. W. N. 451, 11 Cal. L. J. 346]. But no person who is entitled to avoid a mortgage or any other transaction ought to be allowed to do so, in such a manner, as to enable him to recover property, which would otherwise be lost to him and at the same time, to keep the money or other advantages, which he has obtained under it. In other words, a person who seeks to avoid such a transaction must do so only on condition, that he should restore any benefit which he had received, the principle being “one who seeks, equity, must do equity.” Thus where the mother of the plaintiff, being the administratrix to the estate of their maternal grand-father, executed a mortgage to repay a loan taken by the latter, it was held that the plaintiffs were not entitled to avoid the transaction, though it was effected without Court’s permission unconditionally, that is, without paying the debt for which the deed was executed [*Charu Chandra Pal v. Kali Das Chandra* (1910) 13 Cal. L. J. 447, *Eastern Mortgage and Agency Co. v. Rabati Kumar Roy*, 3 Cal. L. J. 260 followed. See *Sinaya v. Munisami*, I. L. R. 22 M. 289, *Tejpal v. Ganga*, I. L. R. 25 A. 59.]

Exception—Section 19 of Act VI of 1889, provides that a disposal of property by an executor or administrator who was appointed before the commencement of that Act and to whom, the provisions of this section, were applicable, shall not be void by reason only that the consent of the Court to the disposal of the property was not obtained. (See App. E.)

§ 9. Restriction.—From clause 2 of this section, it is apparent that it is open to a testator to impose restriction upon the powers and discretion of the executors, if in practice such restrictions prove injurious to the actual administration of the estate, it is equally open to the executor to apply for suitable direction to the Court [*Eastern Mortgage and Agency Co. v. Rabati Kumar Roy*, 3 Cal. L. J. 260]. Where a testator directed that “if it become necessary to borrow more than 1000 rupees or to alienate any property of a greater value or to grant any pottah for any greater amount, then it might be done with the consent of N,” it was held that this was a binding restriction upon the powers and discretion of the executor [*Eastern Mortgage and Agency Co. v. Rabati Kumar Roy*, *supra*]. The validity of such restriction, must be weighed with the consideration that the testator could only have, intended, that the assent of N. should be treated as essential upon the assumption, that it would not be unreasonably withheld (*Ibid*) But where a testator, directed his executor to manage the whole of his properties, through the Court of Wards, it was held that such direction did not amount to a restriction on the executor’s power of sale, [*In the goods of Indra Chandra Singh*, I. L. R. 23 C., 580].

(a) A, a testator, executed a will and made the following provisions amongst others :—

(i) “I have certain personal debt, and I have debt also which is joint with my brothers. In order to pay off the said debt, the executors shall sell, mortgage, or pledge, moveable or immoveable properties of my estate or shall let out putni or Mourasi Mokrari, the immoveable properties of my estate and they shall pay off the said debt from the proceeds.”

(ii).—“If the executors desire to sell the immoveable properties which I own and hold in order to purchase more profitable properties than those, they shall be competent to do that even.

The testator left five sons, of whom, two were minors and three of age. The major sons, in their capacity as executors, mortgaged a portion of the estate in favour of the plaintiff, for the purpose of purchasing other properties. In a suit, by the plaintiff on this mortgage the question being, whether the executors, had power to bind the estate as against the minors, regard being had to the above mentioned clauses, it was held that those clauses were not meant, as limitations on the executor's powers. [*Rajani Nath Mukhopadhy v. Rama Nath Mukherjee*, 3. C. W. N. 483. *Purna Chandra Bakshi v. Nobin Chandra Gungopadhy*. 8. C. W. N. 362.]

(b) Where a testator devised all his moveable and immoveable property “unto the executors, their heirs, representatives, &c.,” to the uses and subject to certain trusts, thereby constituting them trustees also, and without authorizing the sale of any property for the payment of debts, directed them to hold “upon trust either to retain the same in their then present state of investment, or at the discretion of the executors to sell the same, or any part thereof except * * * *, and to invest the money to arise from such sale, as in the said will declared”; it was held that, these provisions did not amount to a restriction on the power of the executors to dispose of properties, vested in them for the purpose of paying the debts of the estate. [*In bonis Nanda Lal Mullick*, I. L. R. 23 C. 908].

§ 10. Jurisdiction of the Court under the section.—Under, the section the power of an executor to dispose of any property, is subject to the restrictions imposed by the will, appointing him. Where therefore, there is no such restriction, the power to dispose is not dependent on the permission of the court and the court has no jurisdiction in the matter [*In bonis Nanda Mullick*, *supra*; *In bonis Indra Chandra Singh* I. L. R. 23 C. 580]. “Section 90” says Pigot J., “does not give the court power to intervene in the administration of the estate in the hands of the executor, save so far as to judge whether, under the circumstances, brought before it, it may seem right that he should have power under the Court's order to act in contravention of a restriction imposed in the will, by disposing of any immoveable property specified in the order, in a manner permitted by the order.” [*In bonis Indra Chandra Singh*, *supra* at 590].

§ 11. “Person interested in the property.”—This words mean a person interested in the property, independently of the executor, whose alienation is sought to be avoided. Where, therefore, D, who was an executor and a residuary legatee under a will, having obtained probate, sold certain properties covered by the will to one J., and a suit was

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brought by a person, holding a decree against D, in his personal capacity, to avoid such sale and to have it declared that the said properties were liable to be sold in execution of his decree, it was held that such person was not one "interested in the property," under sub-section (4), because, he derived, his right not independently of D, the executor, but as a creditor of his in his personal capacity and not being a creditor of the estate of the testator and having no claim to his property, was not entitled to avoid the alienation made by D, even if such alienation, had been open to question by reason of its contravening the provisions of this section [*Juggobandhu Dey Podder v. Dwarka Nath Addya* 1896, I. L. R. 23 C. 446, *Ashutosh Dutt v. Durga Charan Chatterjee*, I. L. R. 5 C. 438; I. L. R. 6 I. A. 182, followed]. So where the executor is a residuary legatee, it is not necessary to obtain an order of the Court for removing an invalid restriction [see sec. 125 (S), *ante*] upon his powers of disposal as legatee [*Juggo Bandhu Dey Podder v. Dwarka Nath Addya*, *supra*].

§ 12. Who may apply for permission.—No one but an executor or administrator, has power to apply to the Court for permission, under this section. "*The permission is to be granted to him to assist him, if he needs such assistance, in carrying out the administration of the estate.*" No permission is to be granted after the estate has been fully administered or where it is unnecessary for the purpose of administration [*In re Nursing Chandra Bysack* (1899) 3 C. W. N. 635 followed in *Lakhi Narain Chatterjee v. Nandarani Debi* (1908), 9 Cal L. J. 116]. See sec. 45 (P) § 6 *ante*.

The Karta of a joint Hindu family, who has taken out letters of administration, may also, apply for permission, if he wants to exercise the powers which this section prevents him from exercising as administrator. That is to say a Karta by taking out letters of administration, ceases to have the wider powers of a Kurta [*Ranjut Singh v. Amulya Prasad Ghose*; 9 C. W. N. 923, 926; See *Sharat Chunder v. Raj Krishna Mukherjee*, 15 B. L. R. 350]. This is on the principle that, one by submitting to the jurisdiction of a court, renders himself liable to be governed by the rules of that court [See *In re Turavalier K. Mudali*, 1. M. H. C. R. 59].

Application for leave to sell should be made, not with the petition for grant, but after completion of the grant. [*In the goods of Ram Lochan Gangooli*, I. C. W. N. CXIX; *in the goods of Juggo Mohan Das*, *Ibid*].

§ 13. Disposal invalidity of.—Section 19 of Act VI of 1889 enacts that "notwithstanding anything in section 90 of the Probate and Administration Act, 1881, a disposal of property by an executor or administrator who was appointed before the commencement of this Act and to whom, the provisions of that section, were applicable shall not be void by reason only that, the consent of the Court to the disposal of the property was not obtained." From this, it is apparent that between the years 1881 and 1889, neither an executor nor an administrator had power to dispose of any property without the permission of the Court. (See sec. 90, as it originally stood, *supra*). But by the operation of this section, which is retrospective all such disposals are now valid. That is to say such disposals are not void by reason only that the consent of the Court was not obtained *Rajani Nath Mukherjee v. Ramp Nath Mukherjee*, 1898 3 C. W. N. 483, See *Preo Nath Karar v. Surja Coomâr Goswami*, (1891) I. L. R. 19 C., 26, at 34.] As to whether validity, depends upon taking out probate see *ante* sec. 157 (s) § 7.

§ 14. Executors discretion.—Executors enjoy a power of discretion as an incident to their office. But this discretion is very different from a special discretion or authority, as when it is given to them in express term by the will. In case of such special discretion, they are bound to exercise it according to their own judgment and it seems, if it is properly and honestly exercised, the Court has no authority to fetter it [*Mouji Bhai v. Mulji Bhoy Rohim Bhoy*, 4 Bom. L. R. 199]. But in the exercise of their ordinary discretion, an executor is not to say “I will do whatever in my discretion, I think fit” “the onus lies on him to show that things were in that state, that it was forced on him, to exercise a discretion one way or the other” [See *Garner v. Moore*, 3 Dr. 283 per. kindnessly]. (1)

Where a testator made use of the following expression in his will with reference to expenses for pujahs &c.—“You (i. e., the executors) are to pay my share of the expenses whatever that may be,” it was held that the testator did not intend thereby to give the executors such an absolute discretion in the matter as might deprive the beneficiary under the will of any beneficial interest in the estate [*Nistarini Dassi v. Nanda Lal Bosu*, I. L. R. 30 C., 369, 385—86, 7 C. W. N. 353, *Mullick v. Mullick*. 1 knapp 245, referred to] or in other words, that the estate was liable for what should be ascertained on enquiry, to be a fit and proper sum to be allowed to the executors for the expenses of the poojahs etc., regard being had to the position of the family and value and circumstances of the estate [*Benod Behari Bosu v. Nistarini Dasi* I. L. R. 33 C. 180, 2 Cal. L. J. 189, 15 Mad. L. J. 331, 9 C. W. N. 961 P. C. 7 Bom. L. R. 887 L. R. 32 I. A. 193]. See post sec. 97 (P) § 3 and sec. 101 (P) § 3. The Principle which ought to guide him in the exercise of his discretion as a guardian in dealing with the properties of the minor, may be laid down in the following words of Lord Watson in, *Learoyd v. Whiteby* [12 App. ca. 722 at 733]. “A trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *Suijuris*, dealing with his own estate. Businessmen, of ordinary prudence may and frequently do select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust and avoid all investments which are attended with hazard” (2). The duty of guardians is primarily to preserve and not to add to the property of the minor [*In re Cassumali*, I. L. R. 30 B., 591, 8 Bom L. R. 883].

If however the deceased's estate is fully administered during the minority of such minor or before he is adopted, the executorship coming to an end he exercises simply the function of a manager.

It may be remarked that guardians are trustees and stand in a fiduciary relation to their wards and administration and management, are not always the same thing.

§ 15. Executor's power to borrow money.—An executor may borrow money for purpose of the estate, but in the absence of any special power given by the will, he has no power to charge his testator's estate for such money or, generally speaking, no person can by contract with an executor, acquire a right against the estate of the deceased. Thus, debts incurred by the executor, are the executor's debts, and the creditor's remedy lies against the

(1) Walker & Elg. 164.

(2) Pomeroy § 1074 pp. 2071—2072.

executor and not against the estate [*Rama Nath. Paul v. Kanai Lal Dey* 7 C. W. N. 104; *Debendra Nath Biswas v. Radhica Churn Sen*, 8 C. W. N. 135; *Farhall v. Farhall* L. R. 7 Ch. 123, *Fairland v. Percy*, 3 P. & D. 217, *Debendra Nath Biswas v. Hem Chandra Roy* I. L. R. 31 C. 253, *Byramji Rustamji v. Heera Bai* 11 Bom. L. R. 250, *Pillgrem v. Pillgrem*, I. L. R. 18 Ch. D. 93] (1). But if the debts are honestly incurred, the executor is entitled to be indemnified against them out of the estate, and the creditors are in equity entitled to the benefit of the executor's indemnity (2). As regards money for purpose of business, it is impossible to carry on the same without borrowing, the duty of the executor is to apply to Court for necessary directions [*M. Neilleo v. Action* (1853) 4 Deg. M. & G. 744, A.] But where the executor has express authority to increase the business, he is entitled to borrow money and secure the loan by mortgage of assets, outside the business [See *Re Dimmock* (1885) 52 L. J. 494]. See infra § Executors power to carry on trade or business. See Sec. 92. (1), § 9 post.

§ 16. Miscellaneous.—An executor is not competent to exercise any power of adoption, although such power may be given to

Power to adopt.

him conjointly with the testator's widow, whether such widow is herself an executrix, or not. [*Amrita Lal*

Dutt v. Surnomoyi Dasi, I. L. R. 24 C. 589; 25 C. 662 27 C. 996; L. R. 27 I. A. 128, I. C. W. N. 345; 2 C. W. N. 389; 4 C. W. N. 549].

**Power to validate
invalidate alienation.**

Neither, he can, validate an invalid alienation by widow although, the next reversioner may by his will empower him to do so [*Hayes v. Horendra Narain*, I. L. R. 31 C. 698.]

**How may executor's
power be lost.**

An executor's power of disposition may be lost by an arrangement, between himself and a creditor that the estate should be released [see *Cassibai v. Ransordus Hunsraj*, I. L. R. 4 B., 5].

An executors is competent to institute a suit for the construction of the will of his testator [see *Kar Saudás Náthá v. Ladvavahu* I. L. R. 12 B. 185, *Byramji Jehangir Lamna v. Ratnagor Jamesetji Ratnagor* I. L. R. 18 B. 1]. See ante sec. 61 (S). Infra, notes.

Executor and Trust Act.—Although an executor, as such may be regarded as a trustee for some purposes he not being an express trustee, the Indian Trust Act (II of 1882) does not apply to him; so that he can not claim to act under section 34 of the said Act [*Trimbak Mahadeb v. Narayan Hori*, I. L. R. 33 Bom. 427, 11 Bom. L. R. 495].

Executor's power to carry on trade or business.—An executor or administrator's duty is to close up and not to continue the business of the testator or or intestate, he is not, therefore, justified in continuing it without an express authority, given by the will or letters. But an executor is justified in keeping a trading establishment, on foot merely for the purpose of completing orders given in the testator's life time or of disposing of the stock and good will to advantage [see *Garrett v. Noble*, 6 Seim 504, *Marshall v. Broadhurst* 1 Cr.

(1) Wms. 1413—1422, 10th Edn. Ing. 380—381, Walker and Elg. 332—235 Theob. 719, 5th Edn.

(2) Theob. *ibid*.

& J. 405]. The principle is that a trade is not transmissible, but is put an end to by the death of the trader. (1). Where authority is given to continue any trading business powers, should be expressly and liberally, given, as regards, adding to capital. [*Kirkman v. Booth* (1848), 11 Beav. 280] and altering the nature or extending the operations of the business or to sell or wound it up, when it ceases to be profitable [see *Devitt v. Keorney* (1883) Tr. 13 Ch. D. 45]. A testator directed that his business in cotton, cotton seed and cotton ginning should, in order to perpetuate his name be carried on by Chuni Lal (testator's daughter's husband) so long as it could be carried on at a good profit but should it appear that the trade would suffer * * * Chuni Lal should stop it. The testator's widow F and Chuni Lal, were the executrix and executor respectively. After the testator's death, they carried on the business in the testator's name and incurring large liabilities, mortgaged the ginning factory to the defendant, Jethabhai. The deed of mortgage, however was executed by the executrix F and Rukmini wife of Chuni Lal suppressing the will. The ginning factory was sold in execution of the mortgage decree and purchased by the defendant mortgagee. In a suit by the beneficiaries, the sons of Chuni Lal, for a declaration that the factory was not liable to be sold and for other reliefs, it was held that the mortgage was by one member of the firm, with the consent and in formal cooperation of the undisclosed partner Chunilal the executor who had the implied authority of the testator to deal with the ginning factory in the ordinary course of business and that therefore the mortgage was valid and binding on the executor as principal and the suit was accordingly dismissed [*Jagguvan Das v. Ram Das* (1841) 2 M. I. A. 487, followed]. It was also held, that an executor carrying on the trade of his testator under a testamentary trust, does not violate his trust by carrying in conjunction with his executors who is not named as a trade trustee and further, though, the trade trustee is personally liable for the debts, he contracts in the course of business, he has a right to be paid out of the specified assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets, so appropriated are concerned. [*Jethabai v. Chhotalal* (1909) 12 Bom L. R. 1, I. L. R. 34 B, 209, *Strickland v. Symons* (1884) 26 Ch. D. 248 followed].

Power to Compromise.—The executor or administrator has large powers to compromise. Such powers extending to claims of legatees as well as claims against the estate. [*Re Houghton*; *Howley v. Blake* (1904) 1 Ch. 622; *Re Warren, Weedon v. Reading* (1884) 32 W. R. (Eng.) 916]. The only question is whether he acted in good faith.

- 207. 91 (P)** ^{270 (S)}.—If an executor or administrator purchases either directly or indirectly any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of the deceased's property.

(1) See *Wills*, 1430-33, 1554 10th Edn.

This section is in accordance with *Hall v. Hallet* (1784) 1 Cox. 134, which lays down that an executor is not to be allowed either immediately or by means of a trustee to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate and shall account for the utmost extent of advantage, made by him of the subject so purchased.

Executor not to purchase from himself directly or indirectly.

Thus a sale by an executor for the purpose of a resale to himself, is equally voidable [*Cook v. Collingridge* (1824) Jac 607]. An assignment of a legacy from a legatee under the will [*Vaughan v. Heseltine*, 1874, I. L. R. I. A. 753, *Barton v. Hassaro*, 3 Dr. & E. W. 461] and of debts due to the estate [*Anan*, 1 salk 155; *Exparti James*, 8 ves 346], to and for the benefit of the executor, are also bad. "One of the most firmly established rules is that person dealing as trustees and executors must put their own interest entirely out of the question and this is so difficult a thing to do in a transaction in which they are dealing with themselves, that the Court will not inquire whether, it has been done or not, but at once says that such a transaction can not stand" [*Cook v. Collingredge*, *supra*—per Lord Eldon]. (1)

But when an executor has renounced, he may purchase the assets [*Mackintosh v. Barber*, 1 Bing 50, 7 Moor 315]. He may also purchase, though, he has not, renounced, when he has not proved the will or acted in any manner, provided he acts in perfect good faith and without anything inequitable in the transaction [*Clark v. Clark* (1883) 9 App cas 733, *Barada Prasad Banerjee v. Gajandra Nath Banerjee*, (1909) 13 C. W. N. 557 at 569, 9 Cal. L. J. 383].

May purchase from legatee—But an executor or administrator may purchase the interest of a legatee—An executor is in the position of a trustee and a legatee in that of *cestique* trust. This being so, such purchase, is only subject to the rule that if the transaction is challenged a Court of Equity, will examine into it, throwing upon the trustee the onus of proving that, it is above all suspicion and perfectly fair. See *Thomson v. East wood*, (1897) 2 A. C. 216 at 236, *Dongau v. Macpherson*, (1902) A. C. 197; see also *Barada Prasad Banerjee v. Gajendra Nath Banerjee*, (1909) 13 C. W. N. 557 at 565-566; 9 Cal. L. J. 383. See *Barton v. Hassard* 3 Drew & W. 461; Wms. 1488 n. (2) 10th Edn.]

208. 92 (P) 271 (S)

Powers of several executors or administrators exercisable by one.

—Where there are several executors, or administrators the powers of all, may in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by one of them who has proved the will or taken out administration.

Illustrations.

- (a) One of several executors has power to release a debt, to the deceased (Wms. 950.)
 (b) One has power to surrender a lease (Wms. 951.)
 (c) One has power to sell the property of the deceased moveable or immoveable (Wms. 951.)
 (d) One has power to assent to a legacy (Wms. 952.)
 (e) One has power to endorse a promissory note payable to the deceased (Walker and Elg 167).
 (f) The will appoints, A. B. C. and D. to be executors and directs that two of them shall be a quorum. No act can be done by a single executor.

COMMENTARIES.

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| <p>§ 1. <i>The Section.</i>
 § 2. <i>Settlement and Compromise</i>
 § 3. <i>Attornment and assent.</i>
 § 3. (a) <i>Release of debt.</i>
 § 4. <i>Sale</i></p> | <p>§ 5. <i>Admission or confession.</i>
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 § 8. <i>"Who has proved the will or taken out administration."</i>
 § 9. <i>"Any one of them."</i></p> |
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§ 1. **The section.**—This section is based upon the principle already noticed [see sec 9 (P) *ante*] that "co-executors, however numerous, are regarded in law as an individual person" and "they have all a joint and entire authority over the whole property," so that "the law doth esteem most acts done, by or to any one of them, as acts done by or to all of them." (1).

Executors and administrators, are thus equal under this section, *i.e.*, "one of several administrators, stands on the same ground and foundation with one of several executors." [see *Jacomb v. Harwood* 2 ves, sen 267, 268] (2).

This section ought to be read with sections 9 (P) and 11 (P) *ante*.

§ 2. **Settlement and compromise.**—One of several executors may settle an account, with a person accountable to the estate, and in the absence of fraud, such settlement will be binding on the others, though they may be dissenting [*Smith v. Everett*, 27 Beav 446]. But where one of three executors, being liable to the testator's estate, jointly with a creditor of the deceased, compromised the claim of such creditor, the effect of which was to relieve him from his own liability, it was held that such compromise was not binding and it was set aside at the instance of the co-executors. [*Scott v. Lord* 8. Jur N. S. 249; See *De-Cordova v. De-Cordova* 4 App. Cas. 692] (3) See § 9 *infra*.

§ 3. **Attornment and assent.**—As the assent to a legacy by one is the assent of all, so the attornment of one executor is the attornment of the rest (4) see illus. (d) and sec 112 (P) § 3.

So, if one of several executors be a legatee, his single assent to his own legacy, will be sufficient to vest the complete title in himself. Again, if the

(1) Shep T. 484; Wms. 950

(2) Shep T. 485 Wms. 954, Walker and Elg. 167.

(3) Wms. 950; Walker and Elg. 159, 166,

(4) Shep. Touch 485, Wms 951, 952.

subject of the legacy, be entire and be given to all the executors, the assent of one of them to his own portion will be binding upon the others. (1). See *illus (d)*.

§ 3. (a) **Release of debt.**—So a release of debt by one of several executors, is valid and shall bind the rest [*Jacomb v. Herwood*, 2 ves. sen 267]. But such debt must be a debt, which subsists as a debt due to the deceased and not a debt, which has merged into a decree in favour of all the executors. Hence one of several executors can not give a valid discharge for the full amount of a joint decree passed in favour of all the executors. Order 21 rule 15 of the Code of Civil Procedure, (Act V of 1908) under which one of several decree-holders can not give a valid discharge for the whole amount of the decree [*Tamman Singh v. Lachhmin Kunwari*, I. L. R. 26 A. 318; *Motiram v. Hannu Prosad*, Ibid 334] recognizes no distinction between decree holders, who are executors and other decree holders [*Lochman Das v. Chaturbhuj Das*, I. L. R. 28 A. 252, 3 A. L. J. 49, A. W. N. (1906), 16.]

§ 4. **Sale.**—As regards power of sale, Sir Whitley Stokes is of opinion that it is desirable to have all the executor's consent, in order to guard against the possible event of a sale, being made by any other executor. (2).

Although, one of several executors may bind his co-executors by sale, it is not to be inferred that such an executor is the agent of the others so as to bind them by his contracts, on the contrary, one of several executors, cannot bind his co-executors by contract [*Turner v. Hardey* 9 M. and W. 770] (3).

§ 5. **Admission or confession and acknowledgment.**—Admission or confession of one executor will bind his co-executors, so that judgment may be given upon such admission against all [*Simpson v. Gutteridge* 1 Mad. 616; *Chandra Kanta Mitter v. Ram Narain Dey Sirkar*, 8 W. R. 63.] (4), similarly, one of several executors may bind the deceased's estate by his acknowledgment under sec. 20 of the Indian Limitation Act XV of 1877 [*Chandra Kanta Mitter v. Ram Narayan Dey Sirkar*, *Supra*].

§ 6. **Suit or action.**—Where there are several executors, they must all join in bringing suits. (5). But if one only has proved the will, the others need not be parties, though they have not renounced [*Davies v. Williams*, 1 Sim 5. But see *Brookes v. Stroud*, 1 Salk 3] (6). Where, however, one or more of several executors have entered into a transaction without disclosing their character as executors, they may sue in respect of such transaction without making their co-executors parties [*Brassington v. Ault*, 2 Bing 177; 9 Moo 340] (7). Thus one of several executors or administrators, who has alone sold any of the goods of the testator, may alone sue for the price, without disclosing his executorship (*Ibid*). So if any property of the deceased be taken out of the possession of one of several executors, he may sue alone to recover it. (8).

Under section 438 of the code of Civil Procedure (Act XIV, of 1882), correspond to order XXXI, rule 2 of Act V of 1908 of new code of Civil Procedure,

(1) Wms 952.

(2) Stokes 173.

(3) Wms 954, Walker and Elg. 167.

(4) Wms. 951 Walker and Elg. 165.

(5) See Wms. 960. 1875.

(6) Wms. 1920 : Walker and Elg. 167. But See Wms 1875; Walker and Elg. 104.

(7) Walker and Elg. 167.

(8) Wms 654. 1877.

where there are several executors or administrators, they must all be made parties to a suit against one or more of them; but executors who have not proved their testator's will, and executors and administrators, beyond the local limits of the jurisdiction of the court, need not be made parties. As to executors who have proved their testator's will, but are beyond the local limits of the court's jurisdiction, the rule seems to be that they also need be made parties. [*Saradindu Roy v. Dharendra Kant Roy Choudhury*, 2 Cal. L. J. 484. See *Hafizabai v. Kazi Abdul Karim*, 1. L. R. 19 B., 83]. Where a suit for the purpose of a motion for a receiver against one only out of the three executors was held to be good, the executor, so made a party having taken out probate.

Where permission was given by Government to occupy a certain plot of land and the order granting permission was on these terms that it is resumable at the pleasure of Government, but in all practical cases, one month's notice of resumption will be given and it was found that at the time of serving such notice, that plot was in the joint occupation of three executors appointed by the will of the last occupier, but the notice was served upon one of these executors and the sufficiency of such notice was disputed; it was held by Sir L. H. Jenkins C. J. that the notice not being condition precedent to the right of resumption, the service upon one of the executors, was good, his Lordship being of opinion that, even if it be assumed that notice is a condition precedent to the right of resumption, that provision (for one month's notice in all practical cases) has been satisfied by the notice being given to one [*Secretary of State v. Vamanrow*, 1. L. R. 30 B. 137, 146].

Although, one of several joint decree-holders may apply for execution under sec. 231 of the Code of Civil Procedure (Act XIV of 1882 or 21 R. 15, Act V of 1908), for the benefit of all, from the fact that one of such decree holders though an executor, can not give valid discharge for the whole amount of the decree, the inference seems irresistible that all the decree-holders, when they are executors, must apply for the execution of a joint decree, passed in favour of all. [See *Lachman Das v. Chaturbhuj Das*, 1. L. R. 28 A. 252, 3 All L. J. 49, All W. N. (1906) 16.] See § 3 a *Supra*.

Execution, Decree, discharge.

§ 7. "Any direction to the contrary."—Illus. (f) is an example of such direction. Sir Whitley Stokes is of opinion that, to speak in his own language, "no one will now be safe in dealing with a single executor, unless he sees the probate and ascertains either that no other executors were appointed by the testator or that the will contains no such direction as that mentioned in the illustration."

This illustration shows that one of several executors, has all the powers which the Legislature, have thought fit to confer upon a sole executor, unless the will, otherwise directs.

As regards, administrators without will, it is apparent, such direction must be given by the court for the words are "any direction to the contrary in the will or grant of letters of administration." With regard to joint administration the well established rule of English Law is, that the Court is to prefer a sole, to a joint administration [*Earl of Warwick v. Greville*, 1 Phill 126]. This rule rests upon very good ground. But where joint administration is, notwithstanding, preferred and there are, as a matter of fact several administrators, it does not seem to be clear on what principle, the court will act for the purpose of giving the necessary "direction to the contrary." In case of administration with the will annexed, is not the court to follow the directions in the will.

This is an additional restriction on the powers of administrators.

§ 8. "Who has proved the will, or taken out administration." That is to say; grant of probate or letters of administration is a condition precedent to one of several executors or administrators acting singly. [See *Satya Prosad Pal Chaudhury v. Moti Lal Pal Choudhury*, I. L. R. 27 C. 683]. Does this section, then, mean that, where there are several executors, "all intermediate acts" (see sec. 12 (P) *ante*), are to be done by all the executors jointly. Is the power again exercisable by one only who has taken it out, the rest having refused or renounced? [See *Satya Prosad Pal Choudhury v. Moti Lal Pal Choudhury*, *Supra*].

§ 9. "Any one of them."—The plain meaning of these words, seems to be that, when one out of several executors or administrators, takes out probate or letters of administration, that one may exercise all the powers alone; but when two or more of the several executors or administrators have taken out such grant, they must all act jointly. Looking, however, to the rule that probate, granted to one of several executors enures to the benefit of all [*Brooks v. Stroud*, 1 Salk 3] it seems to be immaterial whether probate is granted to one only or to one or more (1).

In *Satya Prosad Pal Choudhury v. Moti Lal Pal Choudhury* [I. L. R. 27 Cal. 683], the testator appointed five executors and empowered them jointly to alienate any property for payment of debts and to borrow money, for the improvement and preservation of his estate. One only of the executors, having obtained probate (the others having refused to accept service) it was contended that the executor alone was not competent to exercise the powers of an executor, when the testator directed that they should act jointly. It was held, that the effect of this section, so far as it relates to executors, is, that where several executors obtain probate and the will directs them all, to act together, none of them can act singly; but that the section is not intended to disqualify, by reason of any such direction in the will, one of several executors who alone has obtained probate, the others, having either renounced or refused to accept service. Such an executor is, therefore, competent to borrow money [*Crawford v. Forshaw* L. R. 2 Ch. 261, *Dowse v. Cox*, 3 Bing 20]. As regards power to borrow money. See sec. 90 (P) § 15 *ante*.

Where one may restrain another.—If an executor before obtaining probate, improperly deal with the property of the deceased, the court may on the application of his, co-executor, cause an injunction to be issued restraining the former [*Re Moore*, 13 P. D. 36, following *Re Parkar* 54 L. J. Ch. 694].

209. **93 (P)**
272 (S)

Survival of powers
on death of one of
several executors or
administrators.

—Upon the death of one or more of several executors or administrators, all the powers of the office, become, in the absence of any direction to the contrary, in the will or

grant of letters of administration, vested in the survivors or survivor.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *"Direction to the contrary."*

§ 3. *"All the powers of the office."*

§ 4. *"Or grant of administration."*

§ 1. **The section.**—This section is evidently based upon *Flanders v. Clarke* (3 Atk 509), where it is laid down, that the power of an executor, without being determined by the death of his co-executor, survives to him ; and also upon *Hudson v. Hudson* (Cas. temp. Talbot 127) which prescribes a similar rule as regards the survival of the powers of an administrator on the death of one or more of several administrators (1). See sec 11 (P) *ante*.

§ 2. **"Direction to the contrary."**—In *Hara Coomar Sircar v. Durga Moni Dasi*, [1894 I. L. R. 21 C 195], the testator devising the bulk of his property to his minor grandson, Protap Chandra Sircar, appointed his wife Durga Moni Dasi and brother Jagabandhu Sircar to be his executors, and directed that, "if before Sreeman Protap Chandra Sircar attains majority Jagabandhu dies, then Hara Coomar Sircar will be, executor in his place ; and in case of Durga Moni's death the minor's mother Nistarini will be executrix in her place." Jagabandhu died before the minor attained majority, but the powers of the office did not vest in the survivor, Durga Moni Dasi, because, in accordance with the said direction of the testator, Hara Coomar Sircar was ordered to be appointed to fill up the place of the deceased Jagabandhu Sircar.

§ 3. **"All the powers of the office."**—These words seem to refer to such powers as are incidental to the office of executors and can be exercised by them *qua* executors *i.e.*, by virtue of their office only. There is a distinction between powers which are annexed or incidental to the office of executors, and powers which are specially conferred on them by the testator. In the former case, any person who fills the office is liable to exercise them but in the latter, sometimes a difficulty arises in ascertaining whether the powers, are given to the executors as such or to the persons named. (2). In *Amrita Lal Dutt v. Surnomoyee Dasi* [1 C. W. N. 345, at 358 ; I. L. R. 24 C., 589], Mr. Justice Jenkins expressed an opinion to the effect that, where a power was vested in executors (though it may not be one reposed in them by law), if on the true construction of the will, it appears that the power was coupled with the executorial office, it will survive to the holders for the time being of the office, as though it were a power attached to the office by law.

§ 4. **"Or grant of Administration."**—Here again, the Court will, determine in the case of several administrators, whether upon the death of any one or more of them the powers of the office shall become vested in the survivors, and pass orders accordingly, giving "direction to the contrary," or

(1) Wms. 481, 955 ; Walker and Elg. 10, 165, 2 Camp Rul, Cas 1340.

(2) See Wms. 959.

otherwise. It seems, this must be done at the time when the grant of letters of administration is made. [See *supra*, sec. 92 (P) § 7].

210. $\frac{94 \text{ (P)}}{273 \text{ (s)}}$.—The administrator of effects unadministered, has with respect to such effects, the same powers as the original executor or administrator.

Powers of administrator of effects unadministered.

NOTES AND COMMENTARIES.

§ 1. **Effect.**—It appears to be settled by authority that the word “effects,” is confined to personal property and does not include realty unless an intention appear to the contrary. It has been held to apply to real estate also ; and standing, alone, it will pass the whole of the testator’s residuary estate [*Campbell v. Prescott*, 15 Ves. 507]. So, in this section, the word seems to have been used as synonymous with property ; and like all other words of similar import, it is always liable to be controlled by the rule of ejusdem generis [*Rowlings v. Jennings*, 13. Ves. 39, 46] (1) See *ante* sec. 250 (s) n.

§ 2. **“Unadministered.”**—See section 45 (P).

§ 3. **“The same powers &c.”**—The administrator of effects unadministered, is, as already seen (sec. 45 (P) *ante*), technically administrator *do bonis non*. Such an administrator, becomes the only personal representative of the original deceased ; and in as much as he succeeds to all the legal rights which belonged to the former executor or administrator in his representative character, he enjoys the same powers and authority, as the original representative, [*Catherwood v. Chaband*, 1 Barn. and Cress 154] (2).

211. $\frac{95 \text{ (P)}}{274 \text{ (s)}}$.—An administrator, during minority has all the powers of an ordinary administrator.

Powers of administrator during minority.

See secs. 31 (P) and 32 (P) *ante*.

212. $\frac{96 \text{ (P)}}{275 \text{ (s)}}$.—When probate or letters of administration shall have been granted to a married woman, she has all the powers of an ordinary executor or administrator.

Powers of married executrix or administratrix.

(1) See *Hawk*, 55 ; *Wms.* 1184 ; *Flood*. 150—53.

(2) *Wms.* 888, 924, 925, 965 ; *Walker and Elg.* 65.

Under order XXXI, rule 3 of the Code of Civil Procedure (Act V of 1908 which corresponds with Section 439 of the C. P. Code of 1882, unless the Court directs otherwise, the husband of a married trustee, administratrix, executrix, shall not as such be a party to a suit, by or against her. The word *trustee* was omitted in section 439.

This section adopts the rule which was in force in England, down to 1882. That rule provided that a married woman could not become an executrix and perform any act of administration without the consent of her husband [See *ante* sec. 4 (s), secs. 8 (P) and 13 (P).]

CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

213. $\frac{97 (P)}{276 (s)}$.—It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

As to the deceased's funeral ceremonies.

NOTES AND COMMENTARIES.

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| <p>§ 1. <i>The Section.</i></p> <p>§ 2. <i>Executor's duty (as a trustee) standard of:—</i></p> <p>§ 2(a). <i>Executor's duty as a manager.</i></p> | <p>§ 3. <i>"Funeral ceremonies."</i></p> <p>§ 4. <i>"Suitable to his condition."</i></p> <p>§ 5. <i>"Property sufficient for the purpose."</i></p> |
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§ 1. **The Section.**—The corresponding section of the Indian Succession Act, which is section 276, materially differs from this. Under section 276 it is the duty of the executor to perform the funeral ceremonies, but under this section, his duty is only to provide funds for the performance of the same. The reason for this difference is evidently the fact that, the funeral ceremonies of the majority of persons for whom the Probate and Administration Act, is intended, that is, the Hindus, are required to be performed, under their shastras by persons who may not be appointed executors. In other words, any one, irrespective of caste or creed, may be a Hindu executor, but not one, who is not within certain degrees of relationship with the deceased can perform his funeral ceremonies.

It is noticeable that this section speaks of an executor only, and makes no mention of an administrator.

§ 2. **Executor's duty (as a trustee) standard of:—**The duty of a trustee, is not to take such care only as a prudent man would take, if he had only himself to consider; the duty, rather is to take such care, as an ordinary prudent man would take, if he were minded to make an investment, for the benefit of other people, for whom, he felt morally bound to provide. That is the kind of business the ordinary prudent man, is supposed to be engaged in and unless this is, borne in mind, the standard of trustee's duty, will be fixed too low, lower than, it has ever yet been fixed." [Linley L. J. in *Re Whiteley* (1886) 33 C. D. 347, 355, see *Lord Blackburn in Speight v. Gaunt* (1884) 22 C. D. 727].

It would seem that an executor, is never an express trustee, where a legacy or share of residue is given direct to the legatee and not to the executor *upon trust* to pay it to him (1).

As to where executor converts himself into a trustee :—See *ante* sec. 7 (P) § 5 F. N.

§ 2(a). Executor's duty as a manager :—It appears that management of the deceased's landed property, where there is such property, is one of the legitimate duties of an executor, although, neither the definition (of executor) nor the provisions of this chapter, seems to contemplate any such thing. In England, a great change has been made, in the duties and functions of an executor by the Land Transfer Act of 1897. The Succession Act being based on the law of wills of personality, management of "estates" was out of the question and accordingly the definition was limited to the "executor of the last will of a deceased person." See *supra*, Def. & Sec. 4 (P) § 7 F. N.

Before the Hindu wills Act, an executor was regarded simply as a manager, having no legal character. And since the passing of that Act notwithstanding the provisions of this chapter and the definition of the term executor management of estates has in practice been always considered as one of his legitimate duties. This will appear to be clear from the fact that, as laid down in *Ranjit Singh v. Jagannath Prosad Gupta* [I. L. R. 12 C. 375] debutter property can not be fully administered, such property being endowed in perpetuity. And in *Mirza Kurratalain Bahadur v. Peory Saheb* (1905) 1 C. L. J. 594 (P. C.). Sir Arthur Wilson Said "The title thus conferred upon any executor who has obtained probate, is obviously convenient, as tending to facilitate the administration of the estate of the deceased and the adjustment of the rights of all parties connected with it." Thus it follows that administration of an estate, includes its management or that, where there are landed properties, administration and management, mean the same thing, so far therefore as such properties are concerned, there is no distinction between the functions of an executors and those of a manager.

If after, a testamentary guardian has obtained certificate of administration, the executor who is a different person, applies and takes out probate which will prevail? Is a certificate of administration, on behalf of a minor to be superseded by probate? Where is the law?

This appears to be the rule specially where an executor is directed to hold and manage the property of the deceased during the minority of the testator's son or where he is specially appointed, for the period of such son's minority. As regards the duties of a manager where there is a minor Lord Watson Says. "A trustee, is not allowed the same discretion, in investing the moneys of the trust, as if he were a person *sui juris* dealing with his own estate. Businessmen of ordinary prudence may and frequently do select investments, which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust and avoid all investments which are attended with hazard." (1). [*Learoyd v. Whiteley* 12 A pp. cas 727 at 733]. The duty of guardians is primarily to preserve and not to add to the property of the minor. (In *re Cassumali*, I. L. R. 30 B. 591; 8 Bom. L. R. 883).

(1) Walker & Elg. 309.

If however the deceased's estate is fully administered during minority of such minor, or before he is adopted the executorship coming to an end he exercises simply the functions of a manager. It may be remembered that guardians are trustees and stand in a fiduciary relation to their wards and that administration and management are not always the same thing. (1)

§ 8. "Funeral Ceremonies."—So far as the Hindus are concerned, the expression "funeral ceremonies" seems to be intended to include all the ceremonies commencing from *Boitarini* or death-bed ceremonies to the end of *Ekoddishtha Sraddha*. These are the *death-bed* ceremonies, the *cremation* ceremonies, and the *Sraddha* ceremonies including all minor intermediate ceremonies (2) see sec. 101 (P) *infra*.

§ 4. "Suitable to his condition."—As a general rule, in providing funds for the funeral ceremonies, the executor must take care "not to exceed in funeral pomp: specially, if it be so, that the estate will scarcely reach to pay the debts"; and if he is not perfectly certain as to the solvency of the deceased's estate, it is his duty to incur only such expenses as are absolutely necessary. (3). The fund must vary in every instance, "not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place." [*Edward v. Edward*, 2 Cr and M. 612; 4 Tyrwh 438] (4). In determining the suitability of the fund the only question to be considered

is, whether the sums allowed are more than, what had usually been expended at the funerals of persons of the same rank and position as the deceased. [*Mullick v. Mullick*, 1 Knapp 245]. Extravagant funeral expenses will not be allowed [See *Bridge v. Brown*; 2 X VCCC 181]. A monument may, however, be allowed when the estate is solvent [*Moulton v. Smith*, 16 Rhode Island 126; *Van Emon v. Superior Court* 76 California, 589, *Ferrin v. Mynek*, 41 N. Y. 325].

§ 5. "Property sufficient for the purpose."—If sufficient property has not been left, are the ceremonies to be wholly dispensed with? It seems, that the question must be answered in the negative; for, in England, even where the estate is insolvent, expenses for coffin and ringing the bell, and the fees of the parson, clerk and bearers, have been allowed (*Shelly's case*, 1 Salk. 296) (5).

It is, however, reasonable that in as much as an executor can not be always in a position to ascertain the real condition of the testator's monetary affairs before the funeral, he will not be held responsible on light grounds even for undue extravagance. This must be so where the testator's will by making provisions for substantial legacies, misleads the executor. [See *Stag v. Pomeroy*, 3 Atk 119] (6).

Funeral ceremonies—performance of:—See sec. 276 (S).

(1) Pomeroy § 1074 pp. 2071-2072.

(2) See J. N. Bhattacharjee, Common H. L., Part XV, 2nd Edn. and Tagore L. Lecture 1880 Lect. III.

(3) Shep. Touch. 476; Wms. 972; Flood 467; Walker & Elg. 171.

(4) Wms. 974; Walker and Elg. 274.

(5) Wms. 973.

(6) *Ibid*.

214. 98 (P).
277 (S)

**Inventory and
account.**

—(I) An executor or administrator shall, within six months from the grant of probate or letters of administration or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts, owing by any person to which the executor or administrator is entitled in that character,

and shall in like manner, within one year from the grant or within such further time as the said court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2). The High Court may from time to time prescribe the form, in which an inventory or account under this section is to be exhibited.

(3). If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

(4). The exhibition of an intentionally false, inventory or account under this section shall be deemed to be an offence under section 193 of that code.

NOTES AND COMMENTARIES.

- § 1. *The section*
- § 2. *The contents of the inventory*
- § 3. *"Property in possession"*
- § 4. *"Assets"*
- § 5. *Or administrator*
- § 6. *"From time to time appoint"*
- § 7. *Omission to comply and penalty*

- § 8. *Account*
- § 8. (a) *Account from co-executor*
- § 9. *Miscellaneous*
- § 10. *"Value of such property"*
- § 10(a). *Judge's powers as regards inventory and account.*
- § 11. *Executor's representative, liability of:—to exhibit inventory and account.*

§ 1. The Section.—The section was substituted by section 15 of Act VI of 1889 for the section formerly numbered 98, which provided as follows :—

An executor or administrator shall within six months from the grant of probate or letters of administration, exhibit in the court by which the same has or have been granted an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character and shall in like manner, within one year from the date aforesaid, exhibit an account of the estate, showing the assets that have come to his hands, and the manner in which they have been applied or disposed of.

The rule in the first para of the section is opposed to the present practice in the English Courts. According to such practice in England, an executor or administrator is not bound to exhibit inventory or account unless cited for that purpose at the instance of a party interested. (1).

(Clause 3).—It seems, although, there is nothing in the section, empowering the court to enforce, submission of inventory or account, the court may, under this clause, require, *ex officio*, that an inventory (or account) shall be exhibited. The clause seems to be based on the authority of *Phillips v. Bignell* [(1811) 1 Phil, 240, also *Re Williams* (1881) 3 Hogg. 217].

The submission of inventory and account under this section, may be enforced either under the general rule here laid down or under the special rule prescribed in clause (3). The special rule is evidently intended to be applied in those cases, where in, the general rule is not complied with ; So that, it is clear that the court is not at liberty to require an executor or administrator to exhibit inventory and account under clauses (3), at any time before ; at least six months or twelve months from the date of the grant, have expired—See § 7. *infra*.

But clause (4) seems to govern the exhibition of inventory or account under both the rules.

§ 2. The Contents of inventory.—Inventory should be embodied in one document “massing together a variety of documents” some of which, are in another case wont do. Nor is a mere list of immoveable and moveable properties “a list without a single figure and containing nothing in the nature of a full and true estimate of the property in possession” an inventory which satisfies the requirements of this section a full and true estimate &c. [*Rai Kumari Bhubenswori Kumar v. Collector of Gaya* (1913) 18 C. W. N. 153 (P. C.), 19 Cal L. J. 136].

Inventory is a schedule containing “a true and perfect description of all the goods and chattels of the deceased at the time of his death ; as of his wares, merchandizes, emblements, and the like, with their appraisement and value, and of none else, and of debts due to him and from him”(2). Mr. Justice Williams, says, the inventory ought to contain “a full, true, and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the *donee mortis cause* of the testator or intestate” (3).

(1) Wms. 742 10th Edn.

(2) Shep Touch 477.

(3) Wms. 684, 8th Edn ; 747, 10th Edn.

In this section the words "description" and "and in action", which occur in the above passage have been omitted so that, what is required under this section, is only "a full and true estimate of all the property in possession." But see *infra*.

In England, it has been held that the court can only require, that all the deceased died possessed of, should be included in the inventory. It cannot call for an account of the subsequent profits derived, from the business of the deceased (*Pitt v. Woodham*, 1 Hagg 250). But under this section the inventory appears to be intended to include not only the deceased died possessed of but also the subsequent profits of his business as also the rents of his immoveables interests, dividends &c. See App. C. Act XI of 1899 Sch. III.

§ 3. "Property in possession."—There being no distinction between real and personal property in this country, these words must include '*choses in possession*' as well as '*estates in possession*, *choses in possession*, are such moveable properties as are not in action [see sec. 88 (P) para 2]; and *estates in possession* are those interests in land which are in the immediate use and enjoyment of their owner, as distinguished from those which are in expectancy only (1). This being so, the words property in possession must mean all property moveable and immoveable, which are in the immediate use and enjoyment of the party entitled to it, or, in other words "all the deceased died possessed of" to the exclusion of all property which are either in action or in expectancy.

If this be so, property in action or in expectancy (except debts) is to be excluded from the inventory. But in England such property is included (2). But see *supra*.

It is noticeable that, three statements in succession, as regards the properties of a deceased person, are required to be filed in Court by the executor or administrator. These are:—

(a) Under Sections 62 (P) and 64 (P) *ante*, a statement showing the amount of assets which are likely to come to the petitioner's hands. This is of course before probate or letters.

(b) Under this section, first, the inventory containing a statement of "all the deceased died possessed of";

(c) and secondly, the account of the estate showing the assets which have come to the hands of the executor or administrator.

§ 4. 'Assets':—The word 'assets' may be defined to mean "Those things or interests, whether real or personal, which are available for the discharge of a person's legal obligations in the winding up of his estate" (3). This seems to be the best and most comprehensive definition. The following is laid down in Touchstone:—"All those goods and chattels, actions and commodities, which were the deceased's in right of action or possession, as his own, and so continued to the time of his death, and which after his death, the executor or administrator, doth get into his hands, as duly belonging to him in the right of his executorship and administration and all such things, as do come to the executor and administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee." (4). As regards goods and chattels in action, or in possibility, it is further laid down "they are never accounted assets, until

(1) See Edw. Pro. 3, 51, 112; Wms. P. P. 4.

(2) Flood. 469.

(3) Edw. Pro. 269 (o); Wharton L. Lex.

(4) Shep. Touch 496; Wms. 1662.

they are recovered and come in possession" (1); so that, if there be debts to the deceased they are not to be deemed *assets* until recovered (2). [But see *Khushrobbhai Nasarwanji v. Hormazsha Phirozsha*, 1887, I. L. R. 11 B., 727]. The word *assets* is not, however, confined to any particular kind of property, but it includes, in its largest sense, all property of the deceased which is chargeable with his debts and legacies, and is applicable to that purpose. [See *Amrita Nath Mitter v. Administrator-General of Bengal*, 1897, I. L. R. 25 C., 54, at 58; 1 C. W. N. 500 at 504; *In re Courjon*, I. L. R. 25 C., 65, at 73] (3). *Walkins v. Sarat Chandra Ghose Moulick*, I. L. R. 31 C., 572 at 582, 583]. Thus it has been held that rents and profits accruing after the *debtor's* death, as well as the *corpus* of real estate are assets [See *In re Hyatt, Bowles v. Hyatt* 38 Ch., D. 609] (4). So are debts due from the executor himself (5). So money converted to his own use [*T. Nagaratnammal v. P. Namasinya* (1910) 7 Mad. L. J. 123]. See section 62 (P) and 64 (P) *ante*; also sections 234 and 252 of the Code of Civil Procedure (Act XIV of 1882). [Sec. 50 and 52 of Act V of 1908].

An acquisition by the executor made for the deceased's estate and with the assets, left by such deceased is also a part of that estate and must be regarded as assets [*Ganoda Sundari Choudhurani v. Nalini Ranjan Raha*, 12 C. W. N. 1065, I. L. R. 36 C. 28;]. The general principle is that any item of property which came to the hands of the executor or administrator, is to be treated as assets. But it is not easy to determine in all cases, what property may be treated as "come to the hands." As to this See Wms. 1290, *etseq.* 10th Edn.

§ 5. "Or administrator"—*Administrator* includes all administrators-general, and special or limited [see *Taylor v. Newton* 1 Cas. temp. Lee 15; *Brotherton v. Hellier*, 2 Cas. temp. Lee. 131].

"Within one year from the grant"—It seems this period of one year is fixed with reference to the executor's "year" which is a period, during which it is presumed that the executor may fully, inform himself of the state of the testator's property. [See sec. 117 (P)] and ascertain the residue. But in as much as, the account under this section, is to show the assets which have come to the executor's hands and the manner in which they have been applied or disposed of and one account is only to be exhibited, for which the court may extend the period from time to time as held in *Mohesh Chandra Bhattacharjee v. Biswa Nath Bhattacharjee* [I. L. R. 25 C, 250; 1 C. W. N. 646] and it is reasonable to suppose that such account is intended to be exhibited, generally speaking after the estate has been fully administered, speaking of the powers of an administrator with reference to section 21 of the English Trustee Act 1893, Mr. Straham Says in his well-known work on the Law of Property

* Assets legal and equitable.—Assets are legal when they come into the hands of the executor by virtue of his office (qua executor) for being disposed of in the course of administration they are equitable, when they descend, to the heir charged with payment of the deceased's debts by any deed or writing under seal. The test for determining whether the assets are legal or equitable, is whether the *claimant* can reach them without resorting to a court of Equity (6).

(1) *Shep. Touch* 499; 2 Black 464.

(2) *Shep. Touch* 497.

(3) See Story, Eq. Jur § 531.

(4) *Edward's "Law of property in land"* p. 267 (d).

(5) *Walker and Elg* 178.

(6) *Wms. Part IV. Bk. 1 Chap. T.* 10th Edn. Wms. R. P. pp. 273.

that "He has the same powers of settling claims and the same time—one year for administering the estate as an executor (p. 313, 5th edn). It will thus appear that one year is generally allowed (Stat 56, and 57 vet, C. 53) for administering the estate and not for being fully informed of the state of the testator's property.

§ 6. "From time to time appoint."—These words relate to an extension of time for putting in the account, and does not authorize the court to go on calling upon the executors to exhibit accounts from time to time, as often as the Court thinks fit. The executor is required to exhibit *an account* i.e. one account, not a series of accounts. So in the case of inventory, [Mohesh Chandra Bhattacharjee v. Biswa Nath Bhattacharjee, 1897, I. L. R. 25 C. 250; I. C. W. N. 646, See Sarat Sundori Barmani v. Uma Prosad Ray, I. L. R. 31 C. 628, 8 C. W. N. 578]. Where the testator directed his executor to prepare accounts annually and submit one copy to the District Judge, it was held, that this did not enlarge the Judge's power to call for accounts from time to time. Such direction simply imposed on the executors a duty similar to the other duties, laid on them. [Sarat Sundari Burmani v. Uma Prosad Roy, *Supra*].

§ 7. Omission to Comply.—penalty—In order that an executor may be liable to punishment under clause (3) of this section, it must appear that he *intentionally* omitted to exhibit the account. Where, therefore N. an executor was called upon to submit his accounts within a specified time, after the probate, granted to him, had been revoked and he submitted such accounts after the expiry of that time, whereupon the Court, after examining the same and suspecting its genuineness, ordered him to be prosecuted, it was held, that the Judge was not right in making the order depend on the examination of the accounts themselves, and that he ought not to have made an order sanctioning the prosecution without an enquiry as to whether the omission to produce the same was intentional, or the accounts filed were intentionally false. [Naba Chandra Choudhury v. Tripura Charan Choudhury, 1898, 2 C. W. N. 597].

The question whether the court was justified in calling upon the executor to exhibit accounts after he had ceased to be an executor, was left open (*Ibid*).

An executor who does not file his accounts will have to bear the costs of proceedings held for compelling him to file the accounts. [*In re Jetha Padamsi*—7 Bom. L. R. 457.]. It seems to be clear that no penalty is attached to an omission under the general rule, provided in the section. It is only when the requisition under clause (3) is not complied with that the omission, if intentional, is an offence.

§ 7. (a) Just Cause.—But the question is whether, regard being had to explanation 5th appended to sec. 50 (P) *ante*, all intentional omission, whether under the general rule or clause (3) are not just cause within the meaning of that section. It is submitted, this question must be answered in the affirmative see *ante*, sec. 50 (P) § 15. "Explanation," and § 1 *Supra*.

§ 8. Accounts.—In respect to accounts, it is a well-known principle of law and practice, that any one administering the estate of another, or doing any business for him, is bound to keep clear and regular accounts (1).

"It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor (for in this respect, they all stand in the same position), to be constantly ready with his accounts." [*Pearse v. Green*, 1 Jac and W. 140. *per Sir T. Plumer*, M. R.; *Ganendra Mohan Tagore v. Upendra Mohan Tagore*, 1869, 4 B. L. R. O. C. 103]. Principle in accounting:—As regards accounting, it may be generally stated that an executor or administrator is entitled to credit, in his accounts for expenses, necessarily and properly, incurred by him in good faith, in transacting with reasonable care and diligence, the business of his trust upon due proof of the particular items of expense claimed. The practical situation is usually that the executor or administrator, makes himself liable *de bonis propriis* to others by incurring expense, but that he may reimburse himself under appropriate circumstances out of the assets of the estate." (1).

As to the liability of a representative to render accounts, it may be noted, as held [*Thurlow v. Kendall*, 62 Me. 166, *Re 6 Brien*, 45 Hun 284; *Walker v. Hall*, 1 Pick 20] in Several American States that where no assets come into the hands of the executor or administrator, he is not bound to render accounts. (2).

A legatee has a right to have an explanation of the state of the testator's assets, and to have an inspection of the accounts [*Low v. Bonverie*, 3 Ch. 82. *Lee v. Wilson* 1. Ch. 86]. So it has been held that any person interested in the estate of the deceased has a right to see that the accounts are proper and is also privileged to compel the executor, or administrator to exhibit the same with inventory if necessary. But this right must be exercised very cautiously and only, when there is just cause for it. [*In re Jetha Padamsi*; *Supra*. See *Wms. W. Intes* sec. 149]. An executor who has not proved the will has sufficient interest to call upon the executors who have proved to file their inventory and accounts [*Jehangir Restomji v. Bai-Kubibai* (1903) 1. L. R. 27 B. 281].

A Court of equity will compel an executor or administrator to render accounts even if the testator directed that he should not be compellable to do so [*Gibbons v. Dawshby*, 2 Ch. Ca. 198] (3). It has been held, however, in the American Courts that a prohibition in the will against questioning the acts and decisions of the executor, will prevent a beneficiary from impeaching the executor's conduct for fraud. [*Lee v. Colston*; 5 T. B. Mon. 246].

The estate is to be fully administered under the control of the Probate Court. The administration bond shows that an executor or Administrator as such is bound to administer according to the provisions of the Probate and Administration Act directly under the control of that Court. It is only when, the executor or Administrator, is *functus officio* and is clothed with the character of a trustee (as when he holds property of the deceased after full administration) that he is liable to be sued for accounts in a Court of Equity. Thus so long as an executor administers in the capacity of an executor, he is not liable to be sued for any mal-administration in any court or under any law other than the court of probate and the probate and Administration Act. In other words, the jurisdiction of the Probate Court, so far as administration under the Probate and Administration Act is concerned, is exclusive. This view is supported by Mr. John R. Rood of Michigan in America, Speaking of the duty of a representative to render account, he says "upon the termination of the trust either by his

(1) 18 Cyc. Am 265.

(2) 18 Cyc. Am 1104.

(3) Wms 1610, 10th Edn.

full performance or by his resignation or removal, it is his duty to render a final account of his administration." (1)

And that upon the final allowance of the account, he is entitled to be discharged from his trust and to have his bond cancelled and satisfied. This must be done after notice to all parties, giving them opportunity to dispute and when this is done after the full administration of the estate, the administration closes (2). So it is the rule in the American Courts that the action of the Probate Court is necessary to close administration and relieve executor or Administrator from the responsibility [*Re Scheffer* 58, Menm 29] so that in the absence of any order or decree of that court the functions of an executor or Administrator do not cease merely upon a final settlement and approval of accounts. [*Whetstone v. Mcqueen*; 137 Ala 301, *Francises v. Wing field*, 161 Mo. 540]. See 18 Cye. Am pp. 145-146. See sec. 145 (P).

Suit for account—Limitation:—As regards limitation in suits between a cestui que trust and a trustee, for an account, if the object of such suit is to have an account of the defendant's stewardship that is, of the moneys received and disbursed by the defendant on plaintiff's behalf and to be paid by any balance which may be found due to him upon taking the account it must be governed by six years limitation [*Sarada Prosad Chattopadhyya v. Broja Nath Bhattacharjee*, I. L. R. 5 C. 910, *Hemangini Dasi v. Nobin Chandra Ghose*, I. L. R. 8 C. 788 *Shaphurji Nowroji Pachaji v. Bhikaiji*, I. L. R. 10 B. 242, *Advocate General Bombay v. Baipunjabai*, I. L. R. 18 B. 551, *Ayeshabai v. Ebrahim*, I. L. R. 32 B. 364, Sc. 10 Bom. L. R. 117. *Sarada Prosad Bannerjee v. Gajendra Nath Bannerjee* (1909) 13 C. W. N. 557; 9 C. L. J. 383. See also *Gajanon v. Waman* (1910) 12 Bom. L. R. 881].

A suit for account pure and simple against an executor cannot be treated as a suit against a trustee for the purpose of following trust property [*Sarada Prosad v. Broja Nath*, *Supra*, also *Boroda Prosad v. Gajendra, Nath, Supra*]. An executor must be shown to be an express trustee, before he can be deprived of the benefit of the statute of Limitation [*Re Jane Davis* (1891) 3 Ch. at 124]. But he is not an expressed trustee even for a legatee [*Evans v. Moore* (1891) 3 Ch. 119, See *Trimback Mohadeb v. Narayan Hori*, 33 B. 429] See *Ante* (1 sec. 4 (P) & 7 (P) §.

But there is a distinction between the liability of an executor as such and that of a trustee properly so called and unless an executor is also a trustee or has become a trustee, after discharging his duties as an executor, he is entitled to plead limitation against the claims of the beneficiaries. Where however, he has fully discharged his duties under the Probate and Administration Act, he becomes a trustee and comes within the provisions of section 10 of the Indian Limitation (IX of 1908) by virtue of which he is not entitled to raise any plea of limitation [See *Trimbuk Mohadev v. Narayan Hori* I. L. R. 33 B. 429, 11 Bom. L. R. 495, *Vendravani Das v. Curson Das*, I. L. R. 21 B. 646; *Bhurabhai v. Bai Rakmani* 10 Bom L. R. 540], In *Vendravani Das v. Curson Das* [(1897) 21 B. 646, 664], it has been ruled that where a Hindu will, makes the executor trustees of the whole estate of the testator and the bequests in the will, are not sufficient to exhaust that estate, the executor become express trustee of the undisposed of residue, for the next of kin of the testator and come

(1) Rood § 892, p. 552.

(2) Rood 895 § 553.

within the operation of Sec. 10 of the Indian Limitation Act. To the same effect, are the cases of *Lallubhai v. Bopubhai v. Mankuvasbhai* [(1876) 2 B. 388, 414] and *Khirodmony v. Doorgamony* [(1878) 4 C. 455] and also, the recent case of *Maji Lal v. Gouri Shankor* [(1910) 12 Bom. L. R. 947.]

§ 8 (a).—Account from Co-executor.—An executor who has not taken out probate, is entitled to call upon his co-executor who has taken out probate, to exhibit inventory and account and file the same in Court under this section [*In re Ardeshtis* I. L. R. 27 B. 281; 5 Bom L. R. 131.]

§ 9 Miscellaneous.—It is not necessary that an executor, before proving the will, should go to any distant country where the deceased might have left property in order to ascertain the real value of such property; it is sufficient if he exhibits an inventory on such informations as he can gather, and shows as far as possible the amount and value of the property to be administered [*Stearn v. Mills*, 4 B. and Adol 657] (1).

According to the rules of the High Court in Calcutta, in all cases in which executors or administrator shall neglect to file their inventories or accounts for two months beyond the time allowed to them by law, the Registrar is ordered to issue the necessary citations and other processes to compel the filing of the same and to charge the parties making default with costs thereof (2).

§ 10. Value of Such property.—Value of the property set forth in an inventory, though *prima facie* evidence of the real value, is not conclusive evidence of the same [*Aga Mahomed Rohim Sherazee v. Meerza Ally Mahomed Shoostry*, 4 W. R. P. C. R. 106]. Nor is the statement in a will as to the value of the testator's property any evidence thereof [*Lakshman Dada Naik v. Ram Chandra Dada Naik* 1 B. H. C. R. 561].

§ 10. (a). Judge's power as regards inventory and account :—The Court of Probate has no authority under this section to order a judicial enquiry into the account at the expense of the executors and of his own motion; nor has he any power to appoint Commissioners under the Code of Civil Procedure to audit the same or to call for a revised account, if one had already been submitted and accepted as *prima facie*, true, such submissions and acceptance being final [*Sarat Sundori Burmani v. Uma Prosad Roy*, I. L. R. 31 C. 628, 8 C. W. N. 578]. Nor has the Court jurisdiction to order the executor to produce the funds in his hands in court for the purpose of investment for any other purpose [*Khetra m. Bhattacharjee v. Suromoni Dasi* (1919) 12 Cal. L. J. 602. But see *Heerman Emil Re* (45 L. J. 727)] where the balance of the estate was ordered to be brought into Court by B. Deone J. acting under sec 73 of the Eng. Court of Probate Act 857 (from Lawyer Vol. 12. No. 1 p. 2) of English cases.

But the practice in England, does not seem to fully agree with this view For it is laid down by Mr. Justice William that "After the investigation of the

(1) Wms 1076.

(2) Belch 276, rule 690 or p. 318, rule 752 new edition.

accounts, if the Court finds it true and perfect, it shall pronounce for its validity and in case, all the parties interested have been cited. Such sentence shall be final and the executor or administrator shall be subject to no suit." (1) *ante* see 34 (p) §.

§ 11. **Extent of Executor's liability to account.**—An executor is bound to account, not only for the period of his executorship but also for the period of administration by his predecessors in office. Thus when the period of administrations *durante minor actate* expires, it is the duty of the executor when he comes of age to take the accounts of the administrator *durante minor actate* and the beneficiaries are entitled to call upon the executor to render an account for the entire period commencing from the appointment of the first administrator down to the end of the executorship [*Baroda Prosad Banerjee v. Gajendra Nath Banerjee* (1909) 13 C. W. N. 557; 9 Cal. L. J. 383]. see *ante* see 31 (p) § 8 and 45 (p) § 12.

215. 99 (P)
277A (s).—In all cases where "a grant has been made" of probate or letters of administration intended to have effect throughout the whole of British India, the executor or "administrator" shall include in the inventory of the effects of the deceased all his moveable and immoveable property situate in British India ;

Inventory to include property in any part of British India.

and the value of such property situate in each Province shall be separately stated in such inventory ;

and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

This section corresponds with section 277 A of the Indian Succession Act as amended by Act VIII of 1903.

The words in inverted commas have been substituted for the words "it is sought to obtain a grant" and "the person applying for administration," respectively, by section 16 of Act VI of 1889. See sec. 62 (P) § 7, *Supra*.

216. 100 (P)
278 (s).—The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

Duty of executor or administrator as to property of and debts owing to the deceased.

(1) Wms 1683 10th Edn ; 2070 8th Edn,

NOTES AND COMMENTARIES.

§ 1. *Collect*§ 2. "*Property of the deceased*"* § 3. "*With reasonable diligence*"§ 4. "*The debts*"

§ 1. **Collect.**—This is the fourth duty of an executor. In Sheppard's Touchstone, the duties of an executor are laid down in the following order :— (So in William's Executors, with very slight variation) (1).

1. Funeral :—
2. Inventory
3. Proving will
4. Collecting assets and paying debts.
5. Accounts.

The duty under this section consists in collecting the property of the deceased or to use the words of Mr. Justice Williams "all the goods and chattels so inventoried" (2). The word "collect" appears to have been used in the sense of taking possession of, or removing the goods "into such a position that the executor or administrator may better, perform the duties developing upon" him (3). In the Touchstone the duty is described thus. "The fourth thing whereof, the executor or administrator must take care, is to sell and make money of the goods and chattels and to receive the debts due to the deceased" (4). So collecting and getting in seem to include converting into money (5).

§ 2. "**Property of the deceased.**"—According to Mr. Justice Williams, the *property* is what has been "so inventoried" under section 98 (P) *ante*. In the Administrator-General's Act, for the word "property" the words "assets" has been used (see sec. 52, Act II of 1874, and section 7 of Act IX of 1881). Do the words, *collecting property* and *collecting assets* convey the same meaning? See *In re Courjan* (I. L. R. 25 C. 65, at 73) and *In re Simpson* [1 M. H. C. R. 171].

§ 3. "**With reasonable diligence**"—There is no fixed period for realising the assets of the deceased. It must depend upon the nature of the property and other circumstances [*Hughes v. Empson*, 22 Beav 181] (6). But no undue delay is allowable; and if the executor or administrator by delaying to bring an action, without sufficient reason, enable the debtor to avail the plea of limitation, he will be personally liable [see *Greenwood v. Ferth*, 131 L. J. 293; also *illus (b)* sec 147 (p); *Post.*] Executors have a large discretion in the discharge of their duties which ought to be exercised with great caution and foresight. If for instance, the testator, had left a large number of horses or

(1) Shep, T. 477-81; Wms. Pt. III. Book II, Chap. I.

(2) Wms. 990.

(3) Flood, 469.

(4) Shep, Touch 477.

(5) See Walker and Elg, 175.

(6) Wms. 1824; Walker and Elg. 175.

elephants, it would be the duty of the executor to sell them at once, instead of incurring, the expenses of their maintenance. [see *Hughes v. Empson*, *Supra*] Executors and administrators must take the same care of the properties of the deceased, as they would do of their own. [*Massey v. Banner*, 1 J. and W. 241] (1.)

In the appointment of an agent to carry on business it is incumbent on an executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor, both in the selection, and supervision of the agent and the loss, sustained by the estate can reasonably, be connected with the want of such diligence, the loss must fall on the executor [*Lakhmichand Nemchand v. Jai Kuverbai*, 1 L. R. 29 B. 170; 6 Bom L. R. 907.] As to whether or how far the indemnity clause of section 30 of the Trust Act (II of 1882) applies to such a case; See post, see 146 (P), § 4 last para.

It seems, however, as a general rule, one year is the proper time within which the assets are to be realised, or the properties "collected." A residuary legatee has been held to have a right to insist that in the course of the first year after the testator's death, the clear residue should be ascertained and paid over to him. It is, therefore, the duty of the executor to get in all the properties and pay the debts and legacies "with reasonable diligence." [See *Wightwick v. Lord*, 6 H. L. C. 226; *Grayburn v. Clarkson*, L. R. 3 Ch. 606] (2). See sec. 117 (P), *post*.

"Diligence" is measured by the amount of care which a person is wont to show in the management of his own affairs. The test of due diligence is—"The ordinary person must exhibit what, in the opinion of the Judge or Jury, is the average care of a person of that class and a specialist must similarly attain to the standard to which specialists are expected to conform." (3) See *ante* sec. 90 (P), § 14.

§ 4. "The Debts."—An executor, should on no account, unless there is very good reason for it, permit money to remain on personal security, longer than, is absolutely necessary, even if such money is lent upon that security by the testator himself. Thus in *Powell v. Evans* (5 Ves. 814) the debtor, becoming bankrupt, the executors were held responsible. Bankruptcy of the debtor, does not put an end to the debt, so long as he is not discharged. Thus a direction that the debt due from the husband, to the testator, should be deducted from the legacy to the daughter, does not cause to operate because the husband became a bankrupt during the testator's life time. [*Re Pink v. Pink* (1912) 1 Ch. 498.] So are executors liable if they allow rents to remain in arrear for several years without proper legal steps being taken for their recovery [*Tebbs v. Carpenter*, 1 Madd 290]. An executor is equally liable, whether the debtor is a stranger or a co-executor, although there may be an indemnity clause in the will exonerating him from all responsibility on account of the acts of his co-executors [*Styles v. Guy* 1 M. and G. 422.] The principle is, the executor is not justified in reposing the same confidence upon a debtor which the testator did (*Ibid*) (4).

(1) Walker and Elg. 174

(2) Wms. 1821; Walker and Elg. 175.

(3) Holl, Jur, 90, 101.

(4) Wms, 1813, 1827; Shep. T. 477; Walker and Elg. 176, 246.

Where executor—a debtor.—As regards debts which the executor or administrator himself owed to the testator, the equitable principle is that his liability as debtor, being extinguished it is converted into a liability as executor who as usual, remains accountable for such debt as assets in his hands on the supposition that they have been paid by him to himself [see *Administrator Genl. of Bengal v. Kristo Kamini Dassi*, I. L. R. 31 C. 519, 8 C. W. N. 500, *Yacub v. Bai Rohimathai* 10 Bom L. R. 346; *Freakley v. Fox*, 9 B. & C. 130; Wms 1320-21 8th. Edn. 1178, 9th Edn. 1056, 1057 10th Edn.] See *infra* sec. 104 (P) § 5.

The principle is, the debt being a right to recover the amount by means of a suit and the executor being unable to maintain a suit against himself his appointment by the creditor, suspends such suit and where a personal action is once suspended by the voluntary act of the party entitled, it is for ever gone (1).

Where executor—a Creditor.—Here also, the debt is extinguished, if there are assets. In the absence of assets, the mere fact the debtor makes his creditor his executor, is not sufficient to extinguish the debt. The reason is, where there are assets the executor is supposed to retain them to pay himself on the principle that "having assets amount to payment." [*Waukford v. Waukford* (1700), 1 Salk 304]. The law is the same, where one of several or joint debtors makes their common creditor his executor, so that, if such executor, has assets, the debt is extinguished and he can not sue the other debtors (*Ibid*). So where the creditor is one of several executors, provided he administers [*Woodward v. Lord Dorey* (1555), Plowd 184] and also where the debtor, makes a creditor and another his executor (*Ibid*) see *infra* sec. 104 (P), a 5.

Where however, one of two mortgagees holding the security was appointed, administrator to the estate of the debtor it was held, that this did not extinguish the right of action of the other mortgagee though there were assets in the hands of the administrator mortgagee [*Hossainara Begum v. Rahamannessa Begum* 38 C. 342. 13 C. L. J. 3; *Waukford v. Waukford Supra*, *Harior Pershad v. Bhole Pershad* (1907) 6 C. L. J. 393, 394, *Powell v. Brodhursh* (1901) 2 Ch. 160, *Sitaram v. Shridhor* (1903) 27 B. 292, *Tammon Singh v. Lachimin Kunwari* (1904) 26 A. 318 followed.]

217. 101 (P) —Funeral expenses to a reasonable amount,
279 (s) according to the decree and quality of the

Expenses to be
paid before all debts.

deceased and death-bed charges, including fees for medical attendance; and board and lodging for one month, previous to his death, are to be paid before all debts.

NOTES AND COMMENTARIES.

§ 1. "Funeral expenses"—See sec. 97 (P) *ante*. Funeral Expenses are literally the expenses of the burial (2). As already seen *ante* p. 38, accord-

(1) Wms. 1054, 10th Edn.

(2) Wharton L. Lex Art. "Funeral Charges."

ing to English Law, although there is no right of property in dead-body, the executor has a right to the possession of it, until it is buried [*Williams v. Williams* (1882) L. R. 20 Ch. D. 659]. A direction to cremate, is not binding, but as it is the duty of the executor to give effect to the testator's wishes, where there is such a direction he may burn the dead-body and then bury the ashes in some consecrated ground [See *Reg. v. Price* (1884) 12 Q. B. D. 247, *Re Dixon* (1892) (P) 386]. Where cremation and burial are both desired, cremation should proceed burial (1) where there is no clear direction by the deceased, his body is entitled to christian burial [*Gilbert v. Buzzord* (1830) 2 Hogg cons. 333, 343.]

§ 2. "Degree and quality."—The words are taken from Lord Coke (2), see sec. 97 (P) *ante*.

§ 3. "Death bed charges."—These words must include, among Hindus, charges for death-bed ceremonies. See Sec. 97 (P) *ante*.

§ 4. "Board and lodging."—The provision for board and lodging is hardly necessary for Hindus.

§ 5. Mahamedan Law.—According to Mahamedans, also, funeral expenses and debts are to be paid before any legacy (3).

218. 102 (P).
280 (s)
Expenses to be paid next after such expenses.—The expenses of obtaining probate or letters of administration, including the costs, incurred for, or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges.

NOTES AND COMMENTARIES.

§ 1. "The expenses."

§ 2. Expenses under this section.

§ 3. Costs.

§ 4. "Judicial proceedings."

§ 5. Administration suit.

§ 6. Costs where legal necessity.

§ 1. "The expenses."—In practice, proving the will and taking out probate or letters of administration, is the first duty of an executor or administrator in this country, specially among the Hindus. For, the funeral ceremonies and expenses are generally managed directly under the supervision of the deceased's nearest relatives unless the executor is his brother or uncle, or any such relative or member of the family to which the deceased belonged.

The expenses under this section, are called "executorship expenses" or "testamentary expenses" [*Sharp v. Lush* 10 Ch. D. 468]. And it is now

(1) Rumsey 220.

(2) See Wms 972

(3) Rumsey 220.

settled that “*testamentary expenses or funeral or other expenses*” include the costs of an administration Suit [See *Miles v. Harrison* L. R. 9 Ch. 316; *Penny v. Penny* L. R. 11 Ch. D. 440; *Havloc v. Havloc* L. R. 20 Eq. 271, See also *Webb v. De Beauvoisin*, 31 B. 573] and may also extend to the expenses of administration under an intestacy. [See *In re Clemow*; *Qeo v. Clemow* (1900) 2 Ch. 182] (1).

§ 2. Expenses under this Section.—The amount paid or agreed to be paid by an administrator to a person standing surety for due administration of the estate is an expense within the meaning of this section and is a just charge on the estate [*Imam Bakash v. Puran Mal* 41 Punj. Ree (1906) 31, 7 Punj. L. R. 133.]

§ 3. Costs.—As a general rule, the question of costs is always in the discretion of the court [*Baroda Prosad Bannerjee v. Gajendra Nath Banerjee* 13 C. W. N. 557, at 563]. See *In re Luchminarain*; *Ramrick Das v. Brijji Coomaree* (5 C. W. N. cclxi) and the cases therein.

Although under sec. 83 (P) *ante*, contested proceedings are regarded as regular suits, it does not necessarily follow that in awarding cost, full pleader's fees on the basis of the value of the estate covered by the will (or the value of the property for which probate duty is paid) (2) should be allowed. In such cases Rule 36 el. (a) of the General rules and Circular orders (civil) 1903. vol. I. p. 142 (Calcutta High Court Rules) applies and the Judge has discretion as to costs on account of pleader's fees. That is to say, he may allow a fee according to the valuation of the estate or according to such a sum, not exceeding the valuation, as may be reasonable or according to the importance of the subject of the dispute. [*Amirchand v. Mohammad Bibi*, 6 Cal. L. J. 453, See however *Baij Nath Pershad Singh v. Sham Sunderi Kuer* (1913) 18 C. L. J. 643.]

Costs are payable out of the estate of the deceased in the following cases:—

(a) Where the litigation owes its origin to the fault of the testator, “by reason of the testamentary papers being surrounded by confusion or uncertainty in law or fact” [*Aghore Nath Mukherjee v. Kamini Debi* (1909) 11 C. L. J. 461.] or where those interested in the residue have by their improper conduct, induced the litigation which the court considers reasonable [*Baroda Prosad Banerjee v. Gajendra Nath Banerjee Supra*, *Mitchell v. Gard* 3 Sw. & Tr. 275; see *Godacre v. Smith* L. R. 1 P. & D. 359]. So the costs of two probates of two inconsistent wills, separately taken out, may be allowed out of the estate if the circumstances show that the executors have acted properly [*In bonis Tara Moni Dasi*, I. L. R. 25 C. 553]

(b). Where there is “sufficient and probable ground, looking to the knowledge or means of knowledge of the opposing party, to question either the execution of the will in the capacity of the testator to put forward a charge of undue influence or fraud.” [See *Ferry v. King*, 3 Sw. & Tr. 51, *Williams v. Henry*, 3 Sw. & Tr. 471; *Tippett v. Tippett* 35 L. J. P. & M. 41; L. R. 1 P. D. 54 *Mitchell v. Gard Supra*]. These two principles were laid down by Sir T. P. Wilde in *Mitchell v. Gard (Supra)*. But it may be remarked, that neither of these principles will justify a plea of undue influence for putting it forward [See *Spiers v. English* (1907) p. 122.]

(1) Wms. 983, Theob 706, 5th edn. Walker and Elg. 184.

(2) Bro. P. P. 439; Tr. and Coote 495, Wms. 286 10th Edn.

The party benefited preparing the will or conducting its execution is a reasonable ground for putting forward a plea of undue influence or fraud and in such cases, the party opposing, though unsuccessful, ought not to be condemned in costs [*Wilson v. Barsil* (1903) p. 239] (1) See *ante* sec. 48 (S) § 16(b).

(c). Where the party opposing relies upon so difficult and doubtful a question of law, that it is desirable that it should be decided by a competent Court [*Robins v. Dolphin*, 1 Sw. & Tr. 518] (2). But where the construction of a will was not so difficult as to have required the assistance of the Court, it was held to be not a case where the estate should bear the costs [*Narayani Dasi v. Administrator General of Bengal*, I. L. R. 21 C., 683].

In all the cases unsuccessful party will not be condemned in costs; and if such party is the executor, he will be entitled to costs out of the estate.

(d). Where an executor proves the will in solemn form, whether of his own motion or otherwise, he has a right to have his costs out of the estate. But if the probate is refused, it is in the discretion of the Court to grant or refuse him costs out of the estate (3).

In an administration suit no costs can be given out of the estate, except for those proceedings which are in their origin properly directed for the benefit of the estate or which have in their results conducted to that benefit [*Barlett v. Wood* 9 W. R. Eng. 817] (4).

The costs of an administration suit are to be considered as the first charge upon an estate [*Loomes v. Stothard*, 1 Sim and Stu. 461] (5). As regards costs of probate, the residuary estate is primarily liable. [*Dayabhai Tapidas v. Damodardas Tapidas*, I. L. R. 21 B., 75].

§ 4. "Judicial proceedings that may be necessary."—These words seem to refer to administration suits [*Khusrubhai v. Hormajsha* I. L. R. 17 B., 637; *Stokes* 177] (6).

They must not be understood to suggest that, granting probate or letters of administration is a ministerial act and not a judicial one. As a matter of fact, granting probate is a judicial act and not a ministerial act. The proceeding in which such grant is made must therefore be also a judicial proceeding [See *Allen v. Dundas*, 3 Term Rep 125] (7).

§ 5. **Administration Suit.**—What an administration suit is, is not much known and understood in the maffasil.—Administration suits are exclusively within the jurisdiction of the Equity Courts. The administrative jurisdiction of such Courts consists, rather "in adjusting, enforcing and executing doubtful or recognized rights, than in deciding between directly hostile litigants." In an administration suit, "whatever property ought of right to be dealt with, in any particular case is ascertained, got in, and permanently secured under the orders of the Court; and then all claims and interests alleged in respect of it,

(1) Wms. 90, 10th Edn.

(2) Wms. 380 (u), Bro. P. P. 445; Tr. & Coote 499.

(3) Tr. & Coote 496, 498.

(4) Stokes 177.

(5) Wms. 993; Walker and Elg. 184.

(6) Wms. 993, Walker and Elg. 184.

(7) Flood. 670.

whether conceded or contested, if made *under* and not adversely to the administration are ascertained and declared, and put in train for liquidation. Immediate and vested demands, at once satisfied; future and contingent claims, and continuing interests of whatever duration are provided for, and executed during the whole length of their continuance and ultimately, on the determination of all charges and contingencies, the entire matter is completely wound up,—has been managed and finally disposed of—that is, the property has been *administered*" (1). [See *Dhunraj v. Broughton*, 15 B. L. R. O. C. 296].

An administration suit is usually brought by a creditor of the deceased on his own behalf and on behalf of all other creditors for which their consent is not necessary; or it may be brought by a creditor claiming payment of his own debt only, or by a legatee, or one of the next of kin, or a devisee, or the heir. But a suit by one or more creditors on behalf of other creditors cannot be entertained without the leave of the Court being previously obtained for its institution. [*Oriental Bank Corporation v. Gobind Lall Seal*, 1. L. R. 9 C. 604.]

A creditor's action against the estate of a deceased person, should be treated as an administration suit [*Bai Mahabai v. Magan Chand*, 1. L. R. 29 B. 96 C. Bom. L. R. 853.]

As to the practice and procedure in such suits, see section 213, Code of Civil Procedure (Act XIV of 1882). Order XX rule 13 Act V of 1908. See also Story. Eq. Jur. §§ 548, 548a.

§ 6. **Costs where legal necessity.**—Where a Hindu widow incurs expenses in the construction of a will, such expenses, may be regarded as a legal necessity under Hindu Law, justifying alienation of her inherited property, provided only that these expenses were incurred for the benefit of that property. [*Makhan Lal v. Gayan Singh* (1911) 8 A. L. J. 13].

219. ^{103 (P)}_{281 (s)}.—Wages due for services, rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant are next to be paid, and then the other debts of the deceased according to their respective priorities (if any).

Wages for certain services to be next paid and then other debts.

NOTES AND COMMENTARIES.

§ 1. *The Section.*

§ 2. *"Domestic servant."*

§ 3. *"Labourer and Artizan."*

§ 4. *"Priorities."*

§ 1. **The Section.**—This is section 281 of the Indian Succession Act, with the addition of the words "according to their respective priorities (if

any)." It is not very clear why this addition was made to this section, leaving the corresponding section of the Succession Act unaltered. Mr. Justice Henderson is of opinion, that it was suggested by the case of *Nil Komul Shaw v. Reed* [17 W. R. 513; 12 B. L. R. 287], in which it was laid down by Sir Richard Couch, C. J., that section 282 of the Indian Succession Act no way interfered with the right of a person who has obtained a decree against an executor or administrator to have his decree satisfied out of the properties of the deceased person, to the exclusion of other creditors, after deducting the expenses chargeable under sections 279 to 281 of the same Act. See sec. 104 (P), *infra*.

§ 2. "Domestic Servant"—In *Ogle v. Morgan* [1 DeG. M. and G. 259], where the words were "servant in the testator's domestic establishment," Lord Truro was of opinion that a domestic servant was an in-door servant, *i.e.*, one living in the house and dieted by his master, and accordingly held, that the above mentioned words did not apply to a head gardener living out of the house on board wages. A domestic servant must have been the servant of the deceased, and, as said by Mr. Justice Williams, have "continued in the service of the testator till the time of his death." [See, however *Herbert v. Reid*, 16 Ves. 481]. Hence a coachman provided for the testator by a Job-master, together with a carriage and horses, in the usual course of business, cannot be interpreted to be a domestic servant [*Chilcot v. Broomley* 12 Ves. 114] (1).

But the distinction between in-door and out-door servants which obtains in England can not be applied to the circumstances of this country. Referring to the reasons given in the above mentioned case of *Ogle v. Morgan* (*supra*) for drawing the distinction Mr. Justice Phear said: "The like reasons, however, certainly do not seem to me to arise out of the circumstances of servants in this country, whether forming the household establishment of native gentlemen or

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of English residents" [*Dhanno Serang v. Upendra Mohan Tagore*, 8 B. L. R. O. C. 244]. Accordingly, where the plaintiff, a Serang of a Steamer was in the habit of daily attending his master, the testator's residence, and there obeying any orders that might be given him and returning

to take his meals and sleep on board the Steamer, it was held that such servant was a "domestic servant" [*Ibid* see *Bhim Das v. Upendra Mohan Tagore*, 9 B. L. R., App. 4]. In *Vithoba Malhari v. Corfield* (3 B. H. C. R. App. 21). A dorzi (tailor) serving on monthly or weekly wages was held not to be a "domestic servant." A servant whose whole time is at the disposal of his master is a domestic or household servant as decided in this case. See sec. 63 (S) § 9, *ante*. A "domestic servant" is a household servant, as distinguished from an out-door servant [See *In re Lowson Wardly v. Bringlee* (1914) 1 Ch. 682].

§ 3. "Labourer" and "Artizan"—These are evidently such workmen as do not come within the category of "domestic servant," but come within the operation of Act XIII of 1859 which does not apply to such servants. [See *In re Domestic Servants*, 1869, 3. B. L. R. A. Cr. 32]. A "labourer" or "artizan" may be a domestic servant, but a domestic servant is not a "labourer" or "artizan."

§ 4. "Priorities"—As already, stated, the meaning of priority seems to be what is suggested by the case of *Nil Komol Shaw v. Reed* (17-W R 513 ; 12. B. L. R 287) ; that is, such priority as one who has obtained a decree against the executor, has, over another who has not. (See sec. 252 C. P. Code—Act XIV of 1882, sec. 52 Act V of 1908).

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220. ^{104 (P)}_{282 (S)}.—Save as aforesaid, no creditor is to have a right of priority over another.

So far as aforesaid
debts to be paid
equally and rate-
ably.

But the executor or administrator shall pay all such debts as he knows of' including his own, equally and rateably, as far as the assets of the deceased will extend.

NOTES AND COMMENTARIES.

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| § 1. <i>The Section.</i> | § 6. <i>"Equally and rateably."</i> |
| § 2. <i>Object of Section.</i> | § 7. <i>Barred debt.</i> |
| § 3. <i>"Right of priority."</i> | § 8. <i>Where debt—a charge upon specific property.</i> |
| § 4. <i>"Debts as he knows of."</i> | § 6. <i>Miscellaneous.</i> |
| § 5. <i>"Including his own."</i> | |

§ 1. **The Section**—This section corresponds with section 282 of the Indian Succession Act. But the words "by reason that his debt is secured by an instrument under seal, or on any other account," after the words "over another" which occur in that section, have been omitted in this.

§ 2. **Object of the Section** :—The object seems to be to give to a judgment creditor priority over other creditors. As for any other creditor, he may protect himself and his fellow creditors by bringing an administration suit. But the—point is not clear, the rulings being conflicting. See *infra* §§ 3 and 6.

§ 3. **"Right of Priority"**—In England, the debts of a deceased person are paid in the following order (1).

1st. Debts due to the crown as taxes or those due to the same by *record* or *specialty* (i.e., instruments under seal). See *Infra* § 10.

2nd. Such debts as are by particular Statutes to be preferred to all others, as money due upon poor and local rates.

3rd. Debts of record or such debts as are termed debts secured by *registered judgements, decrees in equity, Statutes* and *Recognizances*.

4th. All other debts, whether secured by instruments under seal or instruments not under seal i.e., simple-contracts, or upon notes, bonds or verbal promises.

(1) 2. Black. 464 ; Wms. Pt. III, Bk. II Chap. II, secs. I to III ; Walker and Elg. 187 ; Edw. Pro. 279. see Camp. Rul. Cas. 204-206.

Formerly debts by contracts under seal, had—priority over debts by simple contracts. But this priority was abolished by Sta. 32 and 33 Vict. C. 46; and now, since January 1870, all creditors of a deceased person stand in equal degree.

Thus it will appear that with the exception of crown debts and debts of record and such as are entitled to priority by particular Statutes, the rules of priority are nearly the same here as in England.

As regards such priority the Law Commissioners say :—

“We do not propose to extend to India the rule which enables an executor to pay any creditor (whether himself or another person) in preference to another creditor of equal decree. We have provided that funeral and death-bed expenses and charge of probate and administration are to be first paid; then wages due to any labourer, artizan or domestic servant employed by the deceased; and that in respect of no other debt shall a creditor be entitled to a preference either by reason of its being secured by deed under Seal or on any other account.” (1)

It must, however, be noted that the executor or administrator ought to be careful to observe the rules of priority laid down in the preceding Sections *i.e.* Secs. 101 (P), 102 (P) and 103 (P); for in case of any breach and on deficiency of assets, he will be personally liable (2). [See Sections 146 (P) and 147 (P) post].

If, for instance an executor or administrator exhausts the assets in discharging the amount of a promissory note given by the deceased, he will have to pay out of his own pocket the funeral and testamentary expenses and the wages mentioned in Sec. 103 (P) (3).

It is not within the competency of a testator to change the rules of law as to the precedence of debts directing his executors to make an equal distribution of his assets among all his creditors [*Turner v. Cox* 8 Moo P. C. 288] (4).

But an executor having no notice may voluntarily pay a debt of an inferior nature before one of a superior [*Harman v. Harman* 2 Show. 492; 3 Mod. 115], provided a reasonable time has elapsed since the testator's death; for such payment, if *precipitate*, would be reckoned as evidence of fraud. In *Nosotti v. Jefferson* (11 W. R. Eng. 84; 9 Jur. N. S. 636, cited in *Asiatic Banking Corporation v. Amador Viegas*, 8 B. H. C. R. O. C. 20); it was held, that an executor in England of a testator who died in India, who had paid simple contract debts nine months after the testator's death, not having then notice of a specialty creditor in India, was justified in doing so, and did not thereby bring himself under personal liability to the specialty creditor.

The executor ought to pay that creditor first who uses the best intelligence [*Ashley v. Peacock* 3 Atk 208] (5). Similarly, of several judgment creditors, he who first sues out execution must be preferred; and before any execution is had it is at the option of the executor or administrator to pay him first whom he may elect. (6) But See *infra*.

(1) Gazette of India, extraordinary, 1846, P. 53.

(2) Wms. 993, 1032; Walker and Elg. 252.

(3) Stokes. 177.

(4) Wms. 994; Walker and Elg. 183.

(5) See Wms. 764, 10th Edn.

(6) *Ibid* 1003, 1008.

Where, therefore, the plaintiff, one of several creditors having obtained a decree against the defendant, Mrs. Reed, in her representative character, for the price of goods supplied to her deceased husband, executed that decree, and the defendant contended that the Court had no power to enforce the decree, but it should leave it to her to satisfy it at her own

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discretion rateably with the other unproved claims against the estate, the defendant's contention being overruled, it was held by Sir R. Couch C. J. that this section did not interfere with the right of a decree-holder to have his claim satisfied under section 203 Act VIII of 1859 which corresponds with section 252 of the code of Civil Procedure [Act XIV, 1882] sec. 52 Act V of 1908 out of the property of the deceased, to the exclusion of other creditors, after deducting the expenses, chargeable under sections 101 (P), 102 (P) and 103 (P) *Supra* "All that it (this section) does" said his Lordship, "is to point out the mode in which the executor or administrator is to administer the assets of the deceased, but it does not enable the executor or administrator, when a decree has been obtained against him, to say that no portion of the assets of the deceased person is to be paid in satisfaction of that decree, but he is to deal with him just as if no decree had been passed." [*Nil Komal Shaw v. Reed*, 12 B. L. R. A. C. 287, 17 W. R. 513; *Venkatarangayan Chetti v. Krishna Sami Ayyangar*, I. L. R. 22 M. 194.].

So where a decree was passed, at the instance of a creditor against the former administrator of a deceased person's estate and that decree was satisfied by the sale of certain property with the sanction of the Court under Section 257 (A) of the Civil Procedure code it was held that the decree and sale being binding upon the succeeding—administrator the rule under this section did not apply. In delivering the judgment of the Court, Mr. Justice Chandra Varker said "The result is no doubt to be regretted because, it virtually gives preference to one creditor as against other creditors of the deceased's estate where as the rule of law is that they shall share—rateably. But the result is due to the fact that the rule of law has to give away, in this case to another rule—i.e., the rule of *Resjudicata* which could have been avoided, had the court which passed the decree in the suit.....treated, as it should have as an administration suit and passed its decree accordingly." Relying on the rule of law however as embodied in this section, his Lordship added "It is the duty of the Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of those—creditors." [*Bai Mehabai v. Mogan Chand*, I. L. R. 29 B. 96 6-Bom. L. R. 853; the correctness of the decision in *Nil Komal Shaw v. Reed* (*Supra*) doubted].

The concluding words of Mr. Justice Chandra Varker coupled with what the Law Commissioners say (*Supra*) seem to point to the conclusion that on no account a creditor is entitled to preference under this section, except where the rule under this section gives way to any other rule of law as noted above. [See *Byramji Rostomji v. Heerabai* 11 Bom L. R 250].

§ 4. "Debts as he Knows of"—Knowledge must be actual as distinguished from a constructive or imputable knowledge. So an administrator who, with such knowledge, pays debts otherwise than equally and rateably as far as the assets of the deceased extend, is personally liable for any loss occasioned to a creditor of the deceased by such improper distribution [*Asiatic Banking Corporation v. Amadar Viegas*, 8. B. H. 6 C. 20].

But the mere circumstance of want of notice of a debt will not relieve an executor or administrator from his liability to satisfy the same, if the assets were originally sufficient for the purpose, notwithstanding that, in ignorance of its existence, he has *bonafide* applied the assets in payment to legatees or persons entitled in distribution. Lapse of time, may, however, as held in some cases, operate as a waiver of the right of the creditor or claimant and preclude him from complaining of the insufficiency of the assets. (1)

§ 5. “Including his own.—(Doctrine of Retainer):—In England, if there are several creditors of equal degree the executor or administrator may pay any one of them in preference to the others. [*Lyttleton v. Cross*, 3 B. and C. 322. Sec. Re Samson* (1906) 2 Ch. 584]. From this the rule naturally followed that, if the executor is himself a creditor he has a right to retain sufficient part of the assets in satisfaction of his own demand, in preference to all other creditors of equal degrees. This is termed in England, the doctrine of retainer (2). The right is founded on the incapacity of an executor to sue himself. He can not be plaintiff in his private capacity and defendant in his capacity of executor. So it has been said “The executor being a creditor of the estate, thereby comes to sustain, virtually, the double relation of debtor and creditor. Hence the legal remedy is suspended and equity will compel the other creditors to allow the executors to retain the sum due to him (2).”

So under this section, an executor or administrator has a right to retain for his own debt due to him from the deceased [See *Mohesh Lall v. Basanta Kumaree* I. L. R. 6 C. 355]. But this right is not in priority or preference to any other creditor of equal degree as in England, for here, under this section, the debts are to be paid “equally and rateably.” This is so because the right of an executor “to pay any creditor (whether himself or another person) in preference to another creditor of equal degree,” has not been extended to this country (see Law Commissioners Report *Supra*).

In England, an executor or administrator may retain not only for debts, which he claims beneficially, but also for those to which he is entitled as trustee [*Plumer v. Merchant* 3 Burr. 1380, *Sander v. Heathfield*, L. R. 19 Eq. 21 (1874)]. So he may retain for debts due to another in trust for him [*Cockcroft v. Black* 2 P. Wms. 298; *Franks v. Cooper*, 4 ves. 763]; for debts paid by him as surety to his testator [*Royd v. Brooks* 34 Beav 7, affirmed on App. 34 L. J. Ch. 605]; for debts due to the firm of, which he is a partner [*Burge v. Button* 2 H. 376; *Morris v. Morris* L. R. 10. Ch. 68; and for debts due to joint creditors of whom he is one. [*Crowder v. Stewart* 16 Ch. D. 368]. An executor may also retain a debt which is barred by the statute of limitation [*Stahlsehmidt v. Lett*. 1 Sm. and G. 415; *Hill v. Walker*, 4 K. and J. 166] (3) [*Budgett v. Budgett* (1895) 1 Ch. 202, 215]. An executor or administrator is bound to pay himself and satisfy his own debt, if he has assets in his hands. If he omits to do so, the debt would not be extinguished and he will be dis-entitled to interest. [*Hossainara Begum v.*

* Re Samson has overruled Re Han Hankey [(1899) 1 ch. 541], which laid down that an executor is not entitled to prefer a simple contract to a specialty creditor in the case of an insolvent debtor.

(1) Wms. 1357-58.

(2) Story Eq. Jur. § 579 (a).

(3) Wms. 1045, 1051, 1053, 1054; Walker & Elg. 195-197.

Rahamannissa Begum (1910) 13 C. L. J. 3, 38 C. 342, *Page v. Lloyd* (1831) 5 Petes 304] See *Supra* sec. 100 (p) § "Debts."

§ 6. "Equally and rateably."—The provision for "equal and rateable" payment is intended to apply in cases where the general assets for the realizable assets are or might be insufficient for the payment in full of the claim of all the creditors. For, "it would be unnecessary and meaningless to provide for proportionate or rateable payment when the realizable assets are amply sufficient for the immediate payment in full of all claims; nor could in such a case the payment of one creditor in full in any way prejudice or postpone the rights of other creditors." [Sale J., in *Amrita nath Mitter v. Administrator-General Bengal*, I. L. R. 25 C., 54; 1 C. W. N. 500].

Hence in the presence of sufficient realizable assets, the executor or administrator cannot claim to pay the creditors rateably out of the surplus income of the estate.

The "equal and rateable" payment is thus to be made out of the assets, and not out of the net income of the estate or any other specific part of the assets. [See *Amrita Nath Mitter v. Administrator General of Bengal, Supra*].

This section (and the corresponding section of the Succession Act) and section 35 of the Administrator-General's Act (Act II of 1874) "deal with the creditor's rights as regards the general assets of their deceased debtor, and apart from any question of lien, the object is to prevent any one creditor obtaining an advantage over another in respect of the payment of his debt, and to provide for the payment of all claims proportionately out of the assets of the estate." [Per Sale J. in *Amrita Nath Mitter v. Administrator-General of Bengal, Supra*; *Hanninabalu Sannappa v. Cook*, 6 M. H. C. R. 346; *Nil Komal Shaw v. Reed*, 12 B. L. R. 287; 17 W. R. 513; *Remfry v. De Penning*, I. L. R. 10 C, 929; *Venkatarangayan Chetti v. Krishna Sami Ayyangar*, 1898, I. L. R. 22 M., 194].

§ 7. Barred debt.—An executor may pay a debt justly due by his testator, although barred by the Statute of limitation, and will, in equity, be allowed credit for such payment [*Tilak Chand Hindumal v. Jitmal Sudaram*, 10 B. H. C. R. 206, 214; *Norton v. Frecker*, 1 Atak. 525; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Administrator-General of Madras v. Hawkins*, I. L. R. 1 M., 267]. It is, however, doubtful whether, having regard to the provisions of section 28, Act XV of 1877 (The Indian Limitation Act) an executor or administrator will now be justified in paying a barred debt. [See the observations of Garth C. J., in *Mohesh Lall v. Basant Koomaree*, I. L. R. 6 C., 340, 355; 7 C. L. R. 121].

But an executor has no right to pay a debt which has been judicially declared to be barred [*Midgley v. Midgley* (1893) 3 Ch. 282]

§ 8. Where debt—a charge upon specific property.—If particular property which is the subject of devise is charged by the testator for the payment of any particular debt, the property so devised is to be construed as given upon trust to pay that debt out of that property, regardless of the general assets of the testator; and in such a case, it seems, it will be within the competency of the testator to give "preference to such debt. If, however, there is a charge of debts, generally in a will upon the testator's estate or any portion of it, this will create no such trust," [See *Ram Dhan Dhar v. Mohesh Chandra*

Chowdhury I. L. R., 9 C. 406]. *Ambica Charan Dutt v. Mukta Keshi*, 2 C. L. J. 138]; 10 C. W. N. 38. The reason is, "because it does not at all vary the legal liabilities of the parties. . . . The executors take the estate subject to the claim of the creditors; they are in point of law the trustees for the creditors; the trust is a legal trust, and there is nothing whatever added to their legal liabilities from the mere circumstance of the testator himself, declaring in express term that the estate shall be subject to the payment of his debts." "But the case is materially different when particular property is given upon trust to pay a particular debt or particular debts. In such a case the trustee has a new duty, not the ordinary duty of an executor to pay debts generally out of property generally, but a duty to apply particular property to secure a particular debt." [*Anunda Moyee Dabi v. Grish Chundra Myti*, I. L. R. 7 C. 772, ~~per~~ Mr. Justice Wilson (now Sir Arthur Wilson) at 775. See I. L. R. 15 C., 66; L. R. 14 I. A. 137]. So where a will directs that the funeral and testamentary expenses should be paid out of a legacy and makes no disposition of the residuary estate such expenses will be payable out of that legacy [*Camani v. Administrator Genl.* Madras, I. L. R. 29 M., 290; See *in re Graniger*; *Dawson v. Higgins* (1900) 2 Ch. 775; *Milnes v. Slater*, 8 ves. 295].

As to liability of lands, purchased from devisees for the debts of the testator, see *Greendar Chander Ghosh v. Mackintosh* (I L. R. 4 C. 897).

§ Right of indemnity.—The right of indemnity is incident to the position of a trustee and the liability in respect of such indemnity, is the first charge on the trust estates. So a trustee or an executor may reimburse himself out of the trust property in respect of all expenses lawfully incurred by him (see sec. 32 Act II. of 1882. The Indian trust Act. [*Peary Mohan Mukherjee Raja v. Narendra Nath Mukherjee*, L. R. 37 I. A. 27; 37 C., 229, 14 C. W. N. 261; 11 C. L. J. 220; 20 M. L. J. 171; 12 Bom. L. R. 257; 7 A. L. V. 125.] in respect of all sums expended by him for the preservation of the trust estate for defending his position as a shebait and for performing the obligations imposed upon him by the instrument creating the trust [See *Walters v. Woodbridge* (1878) L. R. 7. C. D. 504]. As for instance expenses caused by the employment of an agent to collect rents [*Godfray v. Watson* 3 At. K. 518.] of a legal adviser [*Macnamora v. Jones*, Dick 58] *Blackford v. Davis* L. R. 4 Ch. 304] and also expenses for travelling, if properly incurred [*Bridge v. Brown* 2 Y & C., C. C. 181]. A trustee may also be allowed to reimburse himself for necessary expenses incurred in the management of the trust estate, even though the instrument of trust provides, sufficient remuneration for his trouble [See *Webb v. The Earl of Shaftsbury*, 7 ves. 480.]

In *Walters v. Woodbridge* (1878), the trustee was allowed to be paid his costs for defending a suit and his character for the benefit of the estate. So in *Peary Mohan Mukherjee Raja v. Narendra Nath Mukherjee* (*supra*) the estate of a deceased Shebait was held to be reimbursed.

It admits of no doubt, therefore that where an executor pays debts and legacies out of his own funds, he is entitled to be reimbursed. But the question, whether under such circumstances, he is entitled also to be subrogated to the rights and remedies of the creditor or legatee, is not altogether free from doubt. In the American case of *Earle v. Coberley* (65 West Virginia 163) however, it has been ruled, that the executor, is in such case entitled to be subrogated (subrogation is substitution by operation of law, Dr. Ghose says "the right of one creditor to stand in the place of another creditor, comes under the

technical head of subrogation") (1). [See *Hope v. Wilkinson* 32 Am. Rep. 140.]

§ 9. **Miscellaneous.**—As to the liability of a person taking possession of the estate of a deceased Hindu testator without probate, to pay the debts of the deceased, see *Prosunno Chundra Bhattacharjee v. Kristo Chytunno Pal*, (I. L. R. 4 C., 342), and notes, section 252 C. P. Code, by Mr. Justice O'Kenealy. See also *Chatha Kelan v. Gobinda Karumion*, I. L. R. 17 M 186, in which their Lordships of the Madras High Court have differed from the view, taken in *Prosunno Chunder Bhattacharjee's Case* [*Supra*].

As to the right of an executor to retain for his own debt before probate, see *Croft v. Pyke* (3 P. Wms. 183). Messrs *Walker* and *Elgood* are of opinion that, he can retain for such debt when he acts as executor, though without probate (2).

A debt for rent ranks in England in the same degree as a debt on bond or other instrument (3).

"Debts" include "calls" on shares held in limited companies by the testator [*Asiatic Banking Corporation v. Viegas*, 8 B. H. C. R. O. C. 20].

§ 10. **Crown Debt** :—Court fees form a crown debt in this country and ordinarily such debt is entitled to precedence over all other debts [*Gayanando Cala Dassee v. Butto Krishna Bairagee* (1906) I. L. R. 33 C. 1040. *Gubpub Pataya v. Collector of Canora* (1875) I. L. R. 1 B. 7].

§ 11. **Creditor's remedy**—If the executor mal-administers and the creditor is not fully paid, it is open to the latter to see for administration [*Sarat Mani Debee v. Batta-Krishna* (1908) I. L. R. 35 C. 1100].

Debts to be paid before legacies. 221. $\frac{105}{285} \frac{(P)}{(S)}$.—Debts of every description must be paid before any legacy.

NOTES AND COMMENTARIES.

§ 1. *The Section.*

§ 1(a). *Debts no charge.*

§ 2. *"Any legacy."*

§ 3. *Doubt or difficulty as to testator's intention.*

§ 4. *Mahomedan Law.*

§ 1. **The Section.**—The purport of the section is, that, although as between themselves creditors are all equal and are to be paid, as provided in the last preceding section, "equally and rateably", yet as between themselves and legatees the creditors are entitled to a priority and preference, so that legatees are to take nothing until the debts are all paid (4). This is in accordance with the principle—"Be just before you are generous."

(1) Ghose's Mortgage 329. 4th Edn.

(2) Walker and Elg 197.

(3) Wms. 1015.

(4) 2 Story Eq. Jur. §§ 555, 556; Shep T. 480.

§ 1(a). Debts no charge.—As, therefore, the whole estate of a deceased person is liable in the hands of his executor or administrator, for the payment of his debts the executor or administrator must take care to discharge these debts, before he satisfies the demand of any legatee (1). But such debts, even when converted into, a money decree do not create any charge upon the property left by the deceased, so that, a mortgage created by a specific legatee who is also executor before the debts, are all paid, is not necessarily invalid. [*Ambica Charan Dutt v. Mukta Kishori* 2 Cal. L. J. 138, 10 C. W. N. 38]. The case however, will be different if it is proved that the assets were not sufficient for the payment of the testator's debts. See sec. 108 (P) *infra* and sec. 104 (P) § 8 *Supra*.

§ 2. "Any legacy"—That is, any description of legacy. There is no distinction in this respect in favor of specific legacies. Hence if an executor, although acting *bonafide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles if there should ultimately, happen to be a deficiency of assets, although such deficiency may be caused by subsequent events, which he had no reason to anticipate [*Spode v. Smith* 3 Russ. Chanc. Cas. 511] (2).

§ 3. Doubt or difficulty as to testator's intention.—In paying the legacy, should any doubt or difficulty arise, it is the duty of the executor to sue for the construction of the will in order that the intentions of the testator as regards such legacy might be ascertained by the Court. For example, see *Karsandās Nāthā v. Lādkavāhu* (I. L. R. 12 B., 185) and *Byramji Jehangir Laman v. Ratnagar Jamsetji Ratnagar* (I. L. R. 18 B., 1).

§ 4. Mahomedan Law.—It may be noted that in cases of Mahomedan wills, the order of application of the assets, as set forth in these sections (100 to 105) is to hold good except the payment of legacies, which are according to the personal law of the Mahomedans not to exceed one third of whole remains after all the above payments have been made.

222. 106 (P).
286 (S).—If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Executor or administrator not bound to pay legacies without indemnity.

The Section.—This section is intended to afford protection to executors against all possible liabilities in future. Hence in cases of contingent debts and liabilities, or where there is an outstanding covenant of the testator (or bond with a condition or the like) which has never yet been broken, and which may or may not be broken hereafter the executor is not bound

(1) Wms.—1346.

(2) (*Ibid*).

to part with the assets, either to a particular or residuary legatee, without a sufficient indemnity, for otherwise, if the contingent covenants should afterwards be broken, the executor would be liable to answer the damages out of his own pocket without any fault in him [see *Whittaker v. Kershaw*, I. R. 45 Ch. D. 320 (1). *Raja Manuer v. Subbalakshmi*, 2 Mad. L. J. 182]. see sec. 124 (P), *infra*.

Here it may be noticed, that, according to the old practice of the Court of Chancery in England, a legatee was in all cases, bound to give the executor security to refund, if debts should afterwards appear. But this practice having ceased to exist, creditors are now allowed in Courts of Equity, to follow assets in the hands of legatees as well as of the executor (2).

Where the estate is administered in Court, the executor is perfectly safe, and the Court will not allow a creditor to sue the executor after he has paid over the residue under an order of the Court [*Dean v. Allen*, 20 Beav. 1] (3).

223. 107 (P). ^{287 (s)}—If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions ;

Abatement of general legacies.

and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

Executor not to pay one legatee in preference to another.

NOTES AND COMMENTARIES.

§ 1. *A retrospect.*

§ 2. *Abatement.*

§ 3. *Rules regulating the abatement of general legacies.*

§ 4. *Exemption from abatement.*

§ 5. *Residuary legatee cannot call upon general legatees to abate.*

§ 1. **A retrospect** :—From the preceding sections, it is clear that the assets of an executor or administrator, are to be applied to the following purposes :—

(a) Funeral expenses and death-bed charges &c. [Sec. 101 (P), *supra*].

(b) Testamentary or executorship expenses. [Sec. 102 (P), *supra*].

(1) See Wms. 1347—52; Walker and Elg. 216, 253.

(2) Wms. 1354.

(3) Wms. 1350 (1).

- (c) Wages of servants and artizans, &c. [Sec. 103 (P), *supra*].
- (d) Debts of every description [Sec. 103 (P), and 105 (P), *supra*].
- (e) Legacies.

(f) After the debts and legacies have been paid, if there be any surplus, it is the duty of the executor or administrator to apply such surplus, according to the will of the testator, or in case of intestacy, according to the statute of distribution. (1)

Here it may be remembered that, so far as collecting the property of the deceased, the making of an inventory and the payment of the necessary expenses and debts, are concerned, the duties of an administrator whether with will or without will, are the same as those of an executor. But where there is no will to direct the subsequent dispositions of the property from, after the payments of debts, their duties materially affect. (2)

§ 2. Abatement :—The assets may be sufficient for the debts but deficient for the legacies ; or they may be deficient for both, being sufficient only for the funeral and other expenses. Hence, regard being had to the fact that, the testator must be presumed to intend that all his debts and legacies should be equally paid, the necessity arises for abatement. *

§ 3. Rules regulating the abatement of general legacies.—The following general rules may be laid down here :—

(i) That the abatement must take place among all the general legatees (3) in equal proportions (4).

(ii) That as between general legatees, no rule of priority obtains ; but all general legacies abate together and proportionately. Even the executor has no right of priority in regard to his own legacy, as he has in respect of his debt (5). [See second clause of the section ; and also sec. 104 (P), *Supra*]. Nor is a general legacy entitled to priority on the ground of its being applied to any particular purpose or object. Thus a legacy to an executor for his cares and troubles [*Duncan v. Watts*, 16 Beav 204] or a legacy of money for mourning rings [*Apreece v. Apreece* 1 ves and Beam 364], or a legacy to servants or to charities [2 P. Wms. 25 ; *Masters v. Masters*, 1 P. Wms. 423], is not entitled to any preference.

§ 4. Exemption from abatement :—

(a) General legacies given for valuable consideration, or in other words, such general legatees as purchase their legacies, are entitled to exemption. Where, for instance, a general legacy is given in consideration of a debt due to the legatee, or of the relinquishment of any right or interest, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties. But in order that the legatee may enjoy the benefit of his purchase, it is necessary, that the debt or interest should be subsisting at the testator's death [*Burridge v. Bradyl*, 1 P. W. 127 ; *Blower v. Morret*, 2 ves, Sen. 420] (6).

(1) 2 Black. 468 ; Story. Eq. Jur. § 532.

(2) Walker and Elg. 209-10.

(3) See sec. 129 (S) *ante*.

(4) Wms. 1365.

(5) *Ibid* 1370.

(6) Wms. 1376 ; Theob 573, 3rd Edn. ; 1738, 5th Edn.

In *Davis v. Rush* (1 Young 341, the testator having had some accounts between himself and the legatee made a bequest to the latter on condition of his executing a general release of all his claims and demands against the testator. The assets being insufficient for the payment of all the legacies, the question was, whether this legatee was, by the execution of the release a purchaser of the legacy and entitled to be exempted and paid in preference to the other legatees. It was decided by Lord Lyndhurst that if there was no debt actually due to the legatee at the time of the testator's death, he could not be considered a purchaser of the legacy and would not accordingly be entitled to any preference. [See *Health v. Dendy* 1 Russ Chanc, Cas. 543] (1).

(b) Exemption is also allowable where it appears upon a fair construction of the will that the testator clearly manifests an intention to give one general legatee a priority over the others; as where he gave legacies to his two sons and his daughter, with a proviso, that if the assets should prove insufficient for the satisfaction of all these legacies, his daughter should nevertheless, be paid her full legacy, the abatement, being left to be borne by the sons only [*Lewin v. Lewin* 2 ves. sen, 415; *Marsh v. Evans* 1 P. Wms. 668; *Att-Gen. v. Robins*, 2 P Wms. 23] (2). But a mere direction that a legacy is to be paid "in the first place" or "in the next place" or "immediately" or "after-word's" will not create any right of priority between the legacies [*Blower v. Morret*, 2 ves sen 420; *Thwaites v. Forman* 1 Coll 409; *Breston v. Booth*, Mad 161; *Wells v. Barwick* 17 Ch. D. 798] (3).

§ 5. **Residuary legatee cannot call upon general legatee to abate.**—The general estate of the deceased being primarily liable for his debts and general legacies, all that is not specifically bequeathed, must be exhausted before specific legatees can be called upon to contribute anything out of their bequests. And, as there is strictly speaking no residue untill all debts and legacies have been paid, a residuary legatee has no right to call upon general legatee to abate (4). [*Fonnercan v. Payuz*, 1 Bro. C. C. 478, See *Baker v. Former* (1868) L. R. 3 Ch. 537].

Disclaimer of legacy—See *ante* Sec 92(s) §.

224. 108 (P).
288 (s).—Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

Non-Abatement of specific legacy, when assets sufficient to pay debts.

NOTES AND COMMENTARIES.

Non-abatement of specific legacy.—As long as any of the assets not specifically bequeathed, remain, those that are specifically bequeathed are not

(1) Wms 1371.

(2) *Ibid* 1374.

(3) Wms. 1376; Theob. 573, 3rd Edn.; 738-39, 5th Edn.

(4) Wms. 1365.

to be applied in payment of debts [*Barton v. Cooke*, 5 Ves. 464; but see *Newbegin v. Bell*, 23 Beav. 386], or of costs where a suit has been instituted, although to the complete disappointment of the general legatees. But when the assets not specifically bequeathed are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies. [*Sleech v. Thorington*, 2 Ves. Sen. 561, 564] (1). See sec. 110 (P), *post*. So a legatee entitled to a demonstrative legacy in the nature of a specific legacy, must abate with the specific legatees.

Even, if a specific bequest is charged with the payment of debts, and if there be any undisposed of residue, the latter is primarily liable for the payment of the same. [*Hewett v. Snare*, 1 De. G. and S. 333; *Newbegin v. Bell*, *supra*; *Corbett v. Corbett*, L. R. 8 Eq. 407] (2).

The forgiveness by will, of a debt owing to the testator is a specific legacy and not liable to abatement with general legacies [*Re Wedmore* (1907) 2 Ch. 277].

Where there are specific legatees of a particular fund, there may be an abatement among themselves. In *Page v. Leapingwell*

Exception. (18 Ves. 463), a testator devised land upon trust to sell, but not for less than 10,000*l* and gave legacies thereout amounting to 7800 *l*., and "the overplus monies," to A and B. The estate sold for less than 7000 *l*. It was held by Sir W. Grant, M. R., that the other legacies ought to abate equally with those of A and B., he being of opinion that the testator did not mean by the word "overplus" what it usually imports, viz., whatever shall turn out to be the overplus, but that, he (the testator) was contemplating a *certain overplus*, and was making his disposition accordingly. His honor added, "I conceive the true intention to have been that those persons should take as specific legatees; and therefore they must abate among themselves." (See *Sleech v. Thorington*, *supra*) (3).

225. 109 (P).—Where there is a demonstrative legacy, and the assets are sufficient for the payment

289 (s).

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses.

of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

(1) Wms. 1377, 8th Edn; 1100, 10 Edn. Walker and Elg. 182.

(2) Theob 570, 3rd Edn.

(3) 2 W. and T. L. C. 283; Hend. 380.

Thus a demonstrative legacy is liable to abate with general legacies when it becomes a general legacy by reason of the failure of the fund out of which it is payable. (*Mullins v. Smith*, 1 Dr. and Sm., 210) (1). In this, as in the case of specific legacies, the testator's intention is the principle; for it is inferred, that he, in referring to specific parts of his estate for payment of particular legacies, intended those legacies as a preference to others which he had not so secured [*Roberts v. Peacock*, 4 Ves. 150] (2).

- 226.** $\frac{110 (P)}{290 (S)}$ —If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Rateable abatement
of specific legacies.

Illustration.

A has bequeathed to B a diamond ring, valued at 500 Rs., and to C a horse, valued at 1000 rupees. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only 1000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

- 227.** $\frac{111 (P)}{291 (S)}$ —For the purpose of abatement a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

Legacies treated as
general for purpose
of abatement.

In *Jairam Narronji v. Kuverbai* [(1885) I. L. R. 9 B., 491], where the testator directed certain monthly allowances to be paid to each of his widows out of the interest of certain Government Promissory notes, it was held, that if the particular sources of income out of which these allowances were to be paid, should prove insufficient, the rest of the moveable property, or the income derivable from it, as well as the rents of the immoveable property should contribute. See *Bai Bhikaji v. Bai Denbai* (1910) 13 Bom. L. R. 319. See *ante*, sec. 162 (S), § 2.

(1) Hend. 382.

(2) Wms. 1377, 8th Edn. 1000, 10th Edn.

CHAPTER VIII.*

—o:—

OF THE EXECUTOR'S ASSENT TO A LEGACY.

Assent necessary
to complete legatee's
title.

228. $\frac{112 \text{ (P)}}{292 \text{ (S)}}$.—The assent of the executor is necessary to complete a legatee's title to his legacy.

Illustrations.

(a) A by his will bequeaths to B his Government paper, which is in deposit with the Bank of Bengal. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(b) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor.

Note.—In the above illustrations, B would have no right to take possession of the securities, or C to receive the rents, even though the testator by his will expressly directed that they should do so without his executor's assent. "For if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors" (1).

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NOTES AND COMMENTARIES.

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| § 1. <i>Preliminary.</i> | § 4. <i>Retraction of assent.</i> |
| § 2. <i>What constitutes assent.</i> | § 5. <i>Limitation of suits.</i> |
| § 3. <i>Assent, where several executors.</i> | § 6. <i>Miscellaneous.</i> |

§ 1. **Preliminary**.—As regards vesting in executors, the law here is the same as in England, this being so, as already seen [See Sec. 4 (P)], the whole property of the testator vests in the executor so that however specifically an article might be bequeathed to any person on the death of the testator its ownership is transferred not to the legatee, but to the executor whose assent is necessary to complete the 'legatee's' title. Again the whole property of the testator, being vested in the executor [§ Sec. 4 (P), *ante*], he is responsible to the creditors for the satisfaction of their demands to the extent of such

* The provisions in this chapter with respect to an executor apply also to an administrator with the will annexed see sec 148, Act V. of 1881—App. A.

property, regardless of the testator's will, directing that a portion of it shall be applied to other purposes: and as debts of every description are to be paid before any legacy, it is his business first of all to see whether there is sufficient fund left to pay the debts of his testator, for, in case of a deficiency of assets, the general legacies are required to abate [§ 107 (P)]. Hence, as a protection to the executor, the law imposes the necessity that every legatee must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect. The bequest of a legacy, whether general or specific, transfers only an *inchoate* title to the legatee.

It is the executor's assent which renders it complete and perfect (1).

Thus it follows that, an executor is not bound to pay a legacy nor a suit lies for its recovery, before he has taken an account of the assets and liabilities of the testators and ascertained whether there is not sufficient asset for paying the same or giving his assent [*Rajamanner v. Subalakshmi*, 2 Mad. L. J. 182]. And for this purpose under sec. 117 (P). *infra* the law has allowed, to an executor, the period of one year from the testator's death. If therefore without such assent, the legatee takes possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him. If on the other hand, the testator refuses his assent without cause, he may be compelled to give it by a Court of Equity. See § 6 *infra*.

§ 2. What constitutes assent.—There is no specific form in which the assent is to be made. Any expression of the executor, or anything done by him which shows that he agrees or concurs to the thing bequeathed is an assent. An assent is "the agreement of an executor that a legatee shall have the thing bequeathed unto him." So an assent may be express or implied [secs. 113 (P), 15 (P), *infra*]. It is express, when the executor in express words agrees to the legacy and authorizes the legatee to take possession of it; and implied, when such authority is inferred either from direct expressions or from particular overt acts (2). Thus if a horse is bequeathed, and the executor asks the legatee to dispose of, or he permits a third person to buy, or himself buys it from the legatee, this amounts to an assent by implication (see *illus. next sec.*). When the executor informs a legatee that his legacy is ready for him and he may take it whenever he will, this will amount to an express assent (3).

* The assent may also be absolute or conditional, or it may be presumed from circumstances. [See sec. 92 (P.) *ante*.]

§ 3. Assent where several executors.—The assent of one of several executors is sufficient even where, he is himself a legatee [See *Cole v. Miles* 10 Hare 179] (4). See sec. 92 (P), *ante*,

§ 4. Retraction of assent.—As a general rule, assent once given and completed by payment or possession cannot be retracted. See *infra* sec. 113 (P), § 4. But where it has not been so completed it may be retracted, provided no third party is injured thereby (5). So where the assent is given under a mistake (6).

(1) See *Shep. Touch.* 455; *Wms.* 1378; *Walker and Elg.* 135.

(2) *Shep. Touch.* 455; *Wms.* 1380; *Elg.* 137.

(3) See *Wms.* 1381.

(4) *Walker and Elg.* 166.

(5) *Wms.* 1385; *Walker and Elg.* 138.

(6) *Ibid*; *Rep. Leg.* 743, 865, 3rd Edn.

§ 5. Suit for legacy or share of a residue.—See Indian Limitation Act (Act XV. of 1877 Act IX of 1908) article 123; See **Limitation of suits.** also *Cursetjee Pestonjee Botliwalla v. Dadabhai Eduljee*, [I. L. R. 19 M. 425]; *Issur Chandra Das v. Juggut Chandra Shaha* [I. L. R. 9 C., 79]. Although regard being had to sec. 117 (P) *post* which provides that an executor is not bound to pay or deliver any legacy until the expiration of one year from the death of the testator, it may be argued that the effect of this section is to extend the period of limitation authorities are not wanting to show that such can not be the case and that the right to sue for a legacy accrues from the death of the testator and not one year later [See *Waddell v. Harshow* (1905) 1 I. R. 416]. The position that the period, is extended, seems to be supported by *Cursetjee Pestonjee Botliwalla v. Dadabhai Eduljee*, (*supra*).

Where the person liable for the payment of a legacy and the person, entitled to receive it, are the same no question of limitation arises [*Naran Das Ramjee v. Naran Das Ramjee*, 9 Bom. L. R. 287; I. L. R. 31 B. 418].

So where the executor himself is a debtor to the estate of his testator, no limitation would run; as long as he remained executor or did not die [*Yakub v. Bai Rahimatbai*; 10 Bom. L. R. 346].

Where in a suit for legacy, the plaintiff prays for an administration, such prayer being ancillary to his getting the legacy, the suit will be governed by the said Article 123 and not by Article 120 [*Rajamanner v. Venkatakrishnayya*, (1902) I. L. R. 25 M. 361. S. C. 12 Mad. L. J. 183, *Salebhai Abdul Kader v. Bai Safaba* (1911) 36 B. 111]. In such a suit, the plaintiff is not bound to pray for an administration [*Pursholain v. Kala Gobindji*, 3 Bom L. R. 932; I. L. R. 26 B. 301].

Where no assent of executor.—But in *Salebhai Abdul Kader v. Bai Safaba*, *supra*, where Beaman J. held that where there has been no assent of the executor, the suit (for legacy) must include a demand for the administration of the whole estate. The following cases, amongst others, referred to:— [*Cursetjee Pestonjee Batliwalla v. Dadabhai Eduljee* (1896) 19 M. 445, *Okhoy Coomer Banerjee v. Koylash Chandra Ghoshal* (1890), 17 C. 387, *Rajamanpar v. Venkatakrishnayya*, *supra*] Act 123 applies even, when there is no assent of the executor [*Salebhai Abdul Kader v. Bai Safaba*, *supra*].*

Suit by a devisee for possession of immoveable property.—See Art. 140 of Act. XV. of 1877, and *Kristo Kinkar Roy v. Panchuram Mondal* [I. L. R. 17 C. 272].

Suit for the construction of a will.—The right to bring a suit for the construction of a will and for a declaration of the rights of parties affected thereby, is a continuing right and may be claimed within the statutory period (whether 12 or 6 years, under Art. 120 of Act. XV. of 1877) from the time, when the plaintiffs become entitled to possession or other consequential relief [*Chakkun Lal Roy v. Lalit Mohan Roy*, I. L. R. 20 C. 906].

Suit to recover moveable and immoveable properties on declaration of the bequest being void and inoperative.—Articles 120 and 141 of the said Act XV. of 1877, respectively apply; Article 144, does not [*Runchordas Vandrawandas v. Parvatibai*, I. L. R. 23 B., 725; 14 B., 482; L. R. 26 I. A. 71; 5 C. W. N. 621].

Article 91 of the said Act is not applicable to the case of a will [*Sajid Ali v. Ibad Ali*, I. L. R. 23 C., 1, 10; L. R. 22 I. A. 171]

Plea of adverse possession and title there under.—One claiming under a deed or will, which however, does not operate to pass the property in dispute and holding possession as such for more than 12 years, can not acquire an interest in the property, different from that which would have taken, if the deed or will had been valid and operative and consequently, it is not open to him to claim any higher interest. Thus the deed or will purporting to pass limited interest, he can not successfully plead absolute interest by 12 years' adverse possession [*Raja Venkata Narasingha Appa Rao v. Raja Surenani Venkata Puru Shathama Jagananadha Gopal Rao*, I. L. R. 31 M. 331; See observation of Lopes L. J. in *Dalton v. Fitzgerald* (1897) 2 Ch. D. 86 at 93].

Suit by reversioner :—See *Ante* sec III p. 42.

§ 6. Miscellaneous.—The executor's assent, whether express or implied, should be unambiguous. Accordingly, the fact of an executor simply congratulating a legatee on his good fortune would neither be an assent to his legacy nor evidence of assent. But it may be otherwise, if the executor utters congratulatory expressions after he had had sufficient time to acquaint himself with the state of the assets (1).

If the testator by will forgives a debt due to him from a particular person, the debt so forgiven is regarded in the light of a legacy, and the executor's assent is necessary to effectually discharge it. Such legacy, like all other legacies, is not to be snationed by the executor in case the estate be insufficient for the payment of debts (2).

A person appointed executor may assent to a legacy before he proves the will; and even if he should die without taking probate such assent would be effectual (3).

In a suit for legacy the plaintiff must show, that the executor is in possession of sufficient assets, and that he has assented to the legacy being paid to the plaintiff. [*Okhoy Coomer Banerjee v. Koylash Chandra Ghoshal*, 1890. I. L. R. 17 C., 387]. See § 1 *Supra*.

There may be assent as to part only of a legacy (see *Elliott v. Elliott*, 9 M. and W. 28,—*Per Parke, B.*) or a residuary gift [*Austin v. Beddoe*, 41 W. R. (Eng.) 619] (4).

The rules under this Chapter apply to an administrator with the will annexed (see App. sec. 148, Act V of 1881).

A devisee of immoveable property for life, may take possession of such property without reference to the executor or without his assent. In such a case, the possession of the life-tenant is subject to impeachment for waste and the executor is entitled to release from the life-tenant [*Chimanrao Sadasiv v. Rambhai Ghameji*; 4 Bom. L. R. 508, See *In re Fortune*, Ir. R. 4 Eq. 351].

(1) See Wms. 1381-82.

(2) See Wms. 1379; Walker and Elg. 135-36.

(3) Wms. 307, 308, 1384.

(4) Walker and Elg. 136; see, however, Wms. 1382, note (4); Theob. 146.

229. 113 (P).—The assent of the executor to a specific
 293 (S)

Effect of executor's
 assent to specific
 property.

bequest shall be sufficient to divest his interest as executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

This assent may be verbal, and it may be either express or implied from the conduct of the executor.

Illustrations.

(a) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

This is from Wms. 1381.

(b) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest. See *Paramour v. Yardley*, Plowd. 539 (1).

(c) A bequest is made of a fund to A, and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

The particular estate and the remainder constitute but one estate, and therefore the executor's assent to the part is sufficient for the whole [*Weleden v. Elkington*, Plowd. 521; *Adams v. Pierce*, 3 P., Wms. 12] (2).

But where there is a bequest of a number of articles, as stock in trade or plate, the executor may properly withhold his assents as to a part. [*Elliot v. Elliot*, 9 M. and W. 23] (3).

(d) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

This is upon the principle that in the absence of evidence the executors shall be taken to have acted in conformity with their duty. [See *Cray v. Willis*, 2 P. Wms. 531, 539] (4).

(e) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

"Retains it,"—The retaining must be for some considerable time and with the executor's knowledge. [*Cole v. Miles*, 10 Hare 179] (5).

NOTES AND COMMENTARIES.

§ 1. **Where executor trustee for legatee.**—Upon assenting to a specific legacy, the executor becomes a trustee for the legatee his interest therein as an executor being divested thereby [*Dix v. Burford*, 19 Beav. 402] (6).

(1) Wms. 1381.

(2) Wms. 1382.

(3) *Ibid*, F. N.

(4) Wms. 1383.

(5) *Ibid*.

(6) Wms. 1385; Hend 383.

§ 2. "Either express or implied."—From the words "This assent" in the last clause of the section, it may be argued that the assent contemplated by this section only, may be "either express or implied." But see sec. 15 (P) *infra*.

§ 3. Assent, question of law or fact :—Although whether there has been an assent or not, may involve a question of law, it is generally regarded as a question of fact [*Mason v. Farnell*, 12 M. and W., 674] (1).

§ 4. Assent after probate which is revoked.—Assent once given and completed by payment or possession is always good and valid and no fresh assent is necessary even where a codicil is found revoking the gift and bequeathing the same to another legatee, without changing the executor in consequence of which a fresh probate is granted and the second legatee lays claim to the subject of the gift [*In re West, West v. Roberts* (1909) 2 Ch. 180].

230. $\frac{114}{294} (P) (S)$.—The assent of an executor to a legacy may be conditional and if the condition be one which he has a right to enforce, and it is not performed, there is no assent.

Illustrations.

(a) A bequeaths to B, his land of Sultanpur, which at the date of the will and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(b) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

The assent is valid, because the condition was one which the executor had no right to impose.

So if the assent be on a condition subsequent, as,—provided the legatee will pay the executor a certain sum annually, such condition is void, and a failure in performing it shall not divest the legatee of his legacy (2).

231. $\frac{115}{295} (P) (S)$.—When the executor is a legatee, his assent to his own legacy, is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may in like manner be express or implied.

Assent of executor to his own legacy.

(1) Walker and Elg. 137; Wms. 1380, note (o).

(2) Wms. 1384.

Assent shall be implied if in his manner of administering the property, he does any act which is referable to his character of legatee and is not referable to his character of executor.

Implied assent.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

NOTES AND COMMENTARIES.

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| § 1. <i>Executor-legatee to manifest intention to act as executor.</i> | § 3. <i>"If in his manner of administering the property."</i> |
| § 2. <i>"Assent to his own legacy."</i> | § 4. <i>Miscellaneous.</i> |

§ 1. **Executor legatee to manifest intention to act as executor.**—If a legacy is bequeathed to a person, who is named an executor of the will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor. [See sec. 128 (s) *supra*.]

§ 2. **"Assent to his own legacy"**—The union of the character of executor and legatee in the same person makes no difference, for the assent of the executor is as necessary to a legacy vesting in him in the capacity of a legatee, as it is to a legatee vesting in any other person. The principle always to be kept in view is, that before he has carefully examined the assets the executor is not in a position to decide whether they will admit of being appropriated as his legacy, or are to be applied in satisfaction of the testator's debts (1).

§ 3. **"If in his manner of administering the property."**—The last clause of the section seems to be based on the authority of *Doe v. Sturges*, [7 Taunt. 223], where it is laid down that, "If an executor, in his manner of administering the property, does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent to the legacy" (*per* Gibbs C. J.)

Thus, if the executor says that he will have the legacy according to the will, or if he takes the profits of a term to his own use, or repairs the tenements bequeathed at his own expenses, or if he excludes a co-executor from a joint-occupancy of a term with him, or if by deed reciting that he has a term for years by devise, he grants it over,—all these acts indicate an assent to the bequest (2).

"It is a rule, that it is not sufficient, to constitute an implied assent, to show that the act is equally applicable to the title of legatee as to the character of executor" (3).

(1) Wms. 1386; Walker and Elg. 136.

(2) Wms. 1386-87, 1388.

(3) Wms. 1388.

Accordingly, if the executor sells or grants a lease of a house bequeathed to him, this cannot be construed an assent, because the act is consistent with his power and character as executor (1).

§ 4. Miscellaneous.—In the case of a legacy to executors in trust for certain purposes mentioned in the will, their assent has the effect of causing the bequest to cease to be part of the testator's estate, and to convert the executor into trustees for those who are beneficially interested. [*Dix v. Burford*, 19 Beav. 402] (2). That is to say, an executor, upon giving his assent to a specific legacy, bequeathed in trust to him, forth with becomes a trustee (*Ibid*).

Where an executor is both a trustee and executor and a long time has elapsed during which, there is no evidence of his having any thing to do in the character of an executor and there are no debts, it will be inferred that his title is that of a trustee and his interest as an executor has been divested [See *Re Verrells Contract* (1903) 1 Ch. 65].

If an executor-legatee renounce probate, his assent to his own legacy will be ineffectual: and if he take the thing bequeathed without the permission of the administrator *cum testamento annexo*, he will incur the same liabilities as any other legatee so acting (3).

If one of several executors be a legatee, his single assent to his own legacy will vest the complete title in him. And if the subject be entire and given to all the executors, the assent of any one of them to his own will be sufficient (4).

An executor of a will is not required in this country to shed his character of executors before he can appear in his capacity of a legatee. [*Bago Jan v. Chowdhury Zuhooral Hug* 1870, 13 W. R. 69].

232. 116 (P).—The assent of the executor to a legacy gives effect to it from the death of the testator.
296 (s)
Effect of executor's assent.

Illustrations.

(a) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy.

(b) A bequeaths 1000 rupees to B with interest from his death. The executor does not assent to this legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

(1) Stokes 185.

(2) Wms. 1385; Hend. 383.

(3) Wms. 1392; Stokes 185.

(4) Wms. 1392.

It is the duty of executors to assent as soon as all the debts and expenses attending the administration have been satisfied, and there is a sufficient residue to pay all the legacies (1).

233. 117 (P).
297 (s).—An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Executor when to deliver legacies.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

§ 1. This is a mere rule of convenience adopted to give the executor sufficient time to inform himself of the state and amount of the testator's assets, so as to be able to make a proper distribution of them, and it does not in any way prevent the vesting of the legacies. [*Garthshore v. Chalie*, 10 ves. 13]. During this time, it is presumed that the executor will fully inform himself of the state of the property. [*Wood v. Penoyre*, 13 ves. 333, 334]. But within that period, he can not be compelled to pay a legacy, even where the testator, directs it to be discharged within a less time after his death [*Brooks v. Lewis*, 6 Mad. 358; *Benson v. Maude*, *Ibid* 15]. See sec. 21, 56, and 57 Vict C. 53 (Trustees Act 1893).

§ 2. Effect of the section.—The effect of this section read with section 145 (P) *post* therefore is that a residuary legatee becomes entitled to the residue after the executor has paid the testator's debts and legacies and that no legatee can insist upon being paid within a year from the testator's death which is called "the executor's year" [*N. C. Macleod v. Sorabji Edulji Warden*, 7 Bom. L. R. 755]. Accordingly on the expiration of the executor's year and as soon as the debts are paid the residue becomes "free for enjoyment by the heirs" or in other words "divisible" whether it is actually divided or not being immaterial. But see *infra* sec. 145 (P) and [*Ganoda Sundari Choudhurani v. Nalini Ranjan Raha* 12 C. W. N. 1065 at 1070].

Where a testator provided that the share of his son, A should be made over to him absolutely "if at the time, the said residue is divisible my son A, shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rs. 5000" but "if otherwise, the said share shall be held or settled" by the executor "upon trust until the said A shall be free from such debts and liabilities or until he shall die" it was held that the words "such debts" could not be treated to mean all debts whenever contracted, but they meant only those debts which existed at the time, the residue became divisible [*N. C. Macleod v. Sorabji Edulji Warden*, *supra*]. As to whether "the executor's years" extends the period of limitation prescribed for a suit or legacy See *ante* sec. 112 (P) § 5.

(1) Stokes 185; see Wms. 1385-86.

But if the Solvency of the testator's estate and other circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so [*Garthshore v. Chalie, supra*] "I know of no case," said Lord Eldon, in *Angerstein v. Martin* (1 Turn. and R. 241), "which prevents executors, if they choose, from paying legacies, or handing over the residue, within the year; and it is *clear, currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing" (1).

This section furnishes illustrations of a case where the executor may disobey the direction of the testator. The reason is plain. If such provisions, as the illustration shows, are to be enforced the result would be disastrous; for a testator might then provide for all his effects to be thus taken depriving all his creditors of their just dues (2) See *ante* sec. 112 (P) § 1.

§ Extension of one year.—A direction by a testator "that the will shall not have any effect," for at least 2 years from his death operates merely as a postponing clause and does not invalidate the will nor prevent the accrual of the right of legatees and annuitants. It serves as an extension of the period prescribed by this section on the basis of the principle underlying it [*Administrator General of Bengal v. Hughes* (1912) 40 C. 192]. See illustration to this section.

§ 3. Result of authorities as to conversion and Debt.—The result of the authorities seems to be that, although there is no fixed rule that conversion must take place by the end of the year, yet that is the *prima facie* rule and executors who do not convert by that time, must show some reason, why they did not do so: and where the question is clearly raised upon the pleadings, the onus is thrown on the executor to justify the delay [per Sir W. Page Wood L. J. in *Grayburn v. Clarkson*, L. R. 3 Ch. 605].

Thus the "executor's year," as this section provides, extends to legacies only, but it does not extend to debts so that an executor may be sued for the testator's debts even the moment after the latter's death. [*Nicholas v. Judson* (1742) 2 Atk. 301]. See *supra* sec. 105 (P).

(1) Wms. 1393; *Ibid.* F. note 8th Edn.; 1114 10th Edn.; Walker and Elg. 201; Stokes. 186

(2) Wms. 1101, 10th Edn.

CHAPTER IX.*

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

- 234.** $\frac{118}{298 \text{ (s)}} \text{ (P)}$.—Where an annuity is given by the will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.
- Commencement of annuity when no time fixed by the will.

This is the rule laid down by Lord Eldon in *Gibson v. Bott* (7 ves. 96, 97), and in *Fearns v. Young* (9 Ves. 553). In *Houghton v. Franklin* (1 Sim. and Stu. 392), Sir J. Leach observed, that as a will speaks at the death of the testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there are circumstances or expressions in the will to control that intention (1). (See next section).

- 235.** $\frac{119}{299 \text{ (s)}} \text{ (P)}$.—Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death, and shall, if the executor think fit, be paid when due; but the executor shall not be bound to pay it till the end of the year.
- When annuity, to be paid quarterly or monthly, first falls due.

So in Williams on executors and Administrators:—"Where an annuity is expressly directed to commence within the year, as at the first quarter day after the testator's death [*Storer v. Prestage*, 3 Mad. 167], or where an annuity is given with a direction that it shall be paid monthly [*Houghton v. Franklin*, 1 Sim and Stu. 390], the money will be due at the first quarter-day in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor, till the end of the year" (2).

* The provisions in this Chapter as to an executor, apply also to an administrator with the will annexed. See App. A, sec. 148, Act V of 1881.

(1) Wms. 1395; Walker and Elg. 201.

(2) Wms. 1395-96; See Walker and Elg. 201-2.

236. 120 (P).
 300 (S).—Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made ;

Date of successive payments when first payment directed to be made within given time, or on day certain.

Apportionment when annuitant dies between times of payment.

and, if the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

Here the English law has been slightly departed from, as will appear from *Irvin v. Ironmonger* (2 R. & M. 531), in which it is laid down that "where a testator gives an annuity to A for life, and directs the first payment to be made within one month from his (the testator's) death, the annuity commences from the death of the testator, and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of that year" (1).

(1) Wms. 1396; Walker and Elg. 201-2; Theob. 170, 5th Edn.; 136, 3rd Edn.

CHAPTER X.*

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

237. 121 (P).—Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due. See secs. 135 (s) and 134 (s) *ante*.

Investment of sum bequeathed where legacy, not specific, given for life.

NOTES AND COMMENTARIES.

- § 1. *The section.*
- § 2. *Scope of the section.*
- § 3. *Specific Legacy.*

- § 4. *Legacy for life,*
- § 5. *"At the end of the year."*

§ 1. The section.—This section corresponds to section 301 of the Indian Succession Act. Referring to sections 301-307 of that Act (corresponding to sections 121 to 126 of this Act) Mr. Justice Green of the Bombay High Court said: "The language of these sections seems to me rather to imply that, at the time of passing that Act, in 1865, the High Courts had not, in fact, by any general rule, indicated any securities as the proper ones for investment by executors; and I am not aware that the High Court of Bombay has, ever since that time, by any general rule, given any authority or direction with regard to cases of permissible investments." [*De Souza v. De Souza*, (1875) 12 B. H. C. R. 184 at p. 195].

§ 2. Scope of the section.—This section may be read with section 135 (s) *ante*. So read, it will appear there is very little substantial difference between these two Sections. Both the sections treat of bequests given for life which is the same thing as to "two or more persons in succession" [S 135 (s)] (for a gift for life must necessarily imply, other person or persons who are to enjoy after that life.)

* The provisions of this Chapter, will apply to an administrator with the will annexed. See sec. 148, Act V of 1881.

The only difference seems to lie in the fact that this section is limited in its operation as regards the subject of the gift whereas section 135 (s) contemplates no such limit. This appears to be clear from the words "sum & "invest" in this section and also the title of the Chapter which is the investment of funds to provide for legacies."

§ 3. Specific legacy.—See *ante* Sec. 134 (s) which deals with such legacy, bequeathed for life or to "two or more persons."

§ 4. Legacy for life.—These words seem to include all legacies other than what sections 134 (s) & 135 (s) *ante* contemplate, that is pecuniary legacies. The rule therefore is, as laid down in this section that the sum bequeathed, shall be *invested* (not converted and invested) in an authorized security for the benefit of all persons interested in it. As already seen, this rule is based as explained in *Howe v. Lord Dartmouth*, on the presumed intention of the testator that his legatee should enjoy in succession the subject of his bequest.

§ 5. At the end of the year.—See *supra*. Section 117 (P).

238. 122 (P).
302 (s).—Where a general legacy is given to be paid at a future time, the executor shall invest a sum sufficient to meet it in securities of the kind mentioned in the last preceding section.

Investment of
general legacy, to be
paid at future time.

The intermediate interest shall form part of the residue of the testator's estate.

Intermediate interest.

§ 1. The Section.—This is in accordance with the principle laid down by Lord Hardwicke in *Phipps v. Annessley* (1740) (2 Atk. 58), to the effect, that, although legatees are not entitled in any case to receive their legacies before the day of payment arrives, yet they are entitled to go to the Court and pray that a sufficient sum be set apart to answer the legacy when it shall become due (1). There is a distinction between a legacy to be paid at a future time and a legacy which is contingent. See *Re Hall*, *infra* Sec. 124 (p.) 304 (s.)

Phipps v. Annessley.

§ 2. To be paid at a future time.—That is, where the legacy is presently vested, but payable in future. [*In Re Hall* (1903) 2 Ch. 226]. Vaggham Williams L. J. laid down that in such a case, the legatee has an absolute right to go to the trustee or executor and require him to invest the amount of the legacy and not only that "but he could insist upon its being done." *Lloyd v. Williams* 2 Atk. 108. Accordingly, as here in laid down, the intermediate interest shall form part of the residue of the testator's estate.

But if the appointed time which may depend upon uncertain events, arrives in the testator's life time (*e. g.* age of majority) interest will run from his death [*Coventry v. Higgins*, 14 Sim 30].*

§ 3. Intermediate interest.—The general rule is that interest on legacies runs from the time when they are payable, so that where the time of payment is fixed by the testator, they will not carry interest before that time arrives, even where the legacy is vested. [*Heath v. Pery*, 3 Atk. 101, 102].

§ 4. Where legacy is severed.—The rule that legacy carries interest from the time when they are payable by appointment does not apply where the legacy is severed from the testator's estate immediately on his death [*Dundas v. Murray*, 1 Hemm. & M. 425], for the benefit of the object of the gift, that is for some reasons connected with the legacy itself and not for reasons of administration only [*Fasting v. Allen*, 5 Hemm 573]. Severance must be by the direction of the testator, as where the sum is set apart by sub-direction in order to be held by the trustees for the benefit of the children of A. who attain twenty one [See *Re Medlock* () 55 L. J. Ch. 738, *Re Dickson* () 29 Ch. D. 331, 336. *Re Judkins Trust* () 25 Ch. D. 743; *Re Inman* (1893) 3 Ch. 518; *Re Couturier* (1907) Ch. 470]; Where the legacy is given for life with remainder over, it is necessary to sever the legacy from the residue for the sake of the tenant for life [*Kidman v. Kidman* () 40 L. J. Ch. 359].(1) See sec. 107 (s) § 6 (1), (4). The rule also, does not apply where the legacy is to an infant, with the manifestation of an intention that it should carry interest for his maintenance [*Leslie v. Leslie* () Ll. and Go. 1; *Re Churchill* (1902) 2 Ch. 431] (1).

The clause "intermediate interest testators estate" is reproduced in Sec. $\frac{312 \text{ (s.)}}{131 \text{ (p.)}}$ with slight verbal alteration.

239. $\frac{123 \text{ (P)}}{303 \text{ (S)}}$.—Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or,

Procedure when no fund charged with, or appropriated to annuity.

if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may, by any general rule, to be made from time to time, authorize or direct.

* The accuracy of that view is doubtful, see Jarm 1110, 6th Edn.

(1) Jarm 1107, 1112 6th Edn: Wms, 1167, 10th Edn.

240. 124 (P).—Where a bequest is contingent, the executor is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee (if any) on his giving sufficient security for the payment of the legacy if it shall become due.

Transfer to residuary legatee of contingent bequest.

NOTES AND COMMENTARIES.

§ 1. *The Section.*

§ 2. *Contingent legacy and Executor's duty.*

§ 3. *Legacy, subject to divesting contingency.*

§ 1. **The Section.**—This is in accordance with the case of *Webber v. Webber* [1 sim and Stu. 311] following which Mr. Justice Williams says, “that where a legacy of certain sum of money is given on a contingency, the court will not direct a sum of stock, belonging to the estate to be appropriated to pay the legacy when the contingency happens; but will direct the whole residue to be paid over to the residuary legatee on his giving satisfactory security. The principle on which, this was so ruled was, that the legatee being entitled to receive a certain sum in money, when the contingent event happens, the legacy is not capable of being secured by the present appropriation of any sum of stock which is always fluctuating in value (1).”

§ 2. **Contingent legacy and Executor's duty.**—A testator gave to each of his four grand children who should survive him and who being a male shall attain the age of twenty one or being a female shall attain that age or marry under that age, the sum of 1000*l.* without interest in the mean time. After the death of the testator, the executor invested 1000*l.* in 700*l.* Great Eastern Railway 4 percent stock, to meet the legacy to Miss Chalmer one of the four grand-children, she being then a minor and unmarried. Miss Chalmer on attaining 21 demanded 1000 *l.* from the executors and declined to accept 700 *l.* stock which had become depreciated in value since the investment was made. The question whether the executors were justified in appropriating the stock in satisfaction of the legacy. In delivering the judgement of the court of Appeal, Vangham Williams L. J. said. “The question really in each case is this: when the investment which it is sought to appropriate was made, whose property was it. Did it become the property of the legatee or did it remain a portion of the testator's estate? In my opinion in the present case in which the legacy was contingent and the legatee was on the happening of the contingency to take the legacy without interest in the mean while, the answer must be that this investment did not become the property of the legatee, but remained part of the testators estate.”

In my judgment, there was no such appropriation (see *infra*) as would compel the legatee to bear the loss or entitle her to take the profit arising upon the appropriation. The legacy was of such a character that as soon as the investment was made, the interest there on, became a part of the estate of the testator and in the event of its not being wanted to satisfy legacies and the debts or other obligations of the testator it would come to the residuary legatee by falling into the residue."

"I think, there has been some little confusion in the argument between a legacy payable *in futuro* and a contingent legacy.

Legacy payable in futuro and contingent legacy.

If there is a vested legacy, which will certainly be payable *in futuro*, I take it the legatee has an absolute right to go to the trustee or executor and say. "Although my legacy is payable *in futuro* it is a vested legacy, and I require you to invest the amount of it"—and not only would the legatee have the right to require that, but he could insist upon its being done, and when it was done that would be an appropriation in the strict sense of the word,* and the gain or loss upon the investment (as the case might be) would go to or fall upon the legatee * * * * That however, has no application to a case in which not only is the legacy contingent, but the interest in the meantime, until the happening of the contingency, does not go to the legatee, but remains part of the testator's estate. *In Green v. Pigot* [1 Bro. C. C. 103], Lord Thurlow, treated the legacy as vested and defeasible, if the legatee, did not attain 21 or marry. But interest was given to her in the mean-time, and there was accordingly no difficulty in the executor making an appropriation, because the legatee, might at the time be treated as owner of the investment; she taking the interest in the mean time. In the present case, however, the contingent legatee, does not take the interest in the mean time and that interest is part of the testator's estate, and in these circumstances, I have not heard of any authority cited which leads to the conclusion, that the executor had any right to do, more than as prudent executors to retain as part of the estate, a sufficient sum to answer the legacy, if it should become necessary to do so, by reason of the happening of the contingency. The executor would have to deal reasonably with that part of the estate and in fact, would have to invest it as part of the estate generally and not as appropriated to any particular purpose * * * *. There is no authority for the proposition that the executors are entitled at their own will to take a part of the estate which they are holding to answer the contingent legacy and turn it into a trust fund, treating the contingent legatee as a cestui que trust [*In re Hall*; *Foster v. Metcalfe* (1903) 2 Ch. 226; 88 L. T. 619; 72 L. J. Ch. 554].

§ 2. **Contingent legacy and executor's duty.**—In *Re Hall* [1903, 2 Ch. 226] it was held that when a cash legacy is given upon the happening of a contingency e. g. attainment of 21 years by the legatee, but without interest in the mean time, the executor is not entitled to set apart and invest the amount and appropriate the investment to satisfy the legacy. So that in case, on the happening of the contingency, the investment, has become depreciated in value, the legatee must bear the loss, *Sir Williams L. J.* in concluding his judgment said "All, I do say is that the executors had no authority to make the appropriation which they did make, and that the loss by depreciation

* So it is laid down that an appropriations in the strict sense of the word, can only be made with the consent of a legatee who is *Sui Juris* [*Re Salaman De Pass Sounen* that (1907) 2 Ch. 46].

in value of the stock, can not fall upon the legatee. She is entitled to receive 1000/ in full without any deduction (1).

§ 3. Legacy, subject to a divesting contingency:—Where a legacy is given subject to a divesting contingency that is with a gift over, on the happening of a subsequent uncertain event, such contingency will not prevent the legatee from receiving his legacy at the end of a year from the testator's death; and he will not be bound to give security for the repayment of the money; in case, that contingency happens. Thus, where a legacy was given on condition of being void, in case, the legatee should succeed to a certain estate, it was held, that the legatee was entitled to the amount of his legacy without security [*Fawkes v. Grey* () 18 Ves. 130]. But there are cases where security may be required. [See *Colston v. Morris* () Mad. 89] (2).

Mr. Jarman is of opinion that such a condition is repugnant, where the legacy is a pecuniary one and therefore void. The testator's object may be attained by means of a trust. (3).

241. 125 (P)
306 (s)

Investment of residue bequeathed for life, with direction to invest in specified securities.

—Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

In case of any such bequest as this section contemplates, it shall be the duty of the executor to convert the residue into money and invest the same in the security specified by the testator (4).

242. 126 (P)
307 (s)

Time and manner of conversion and investment.

—Such conversion* and investment as are contemplated by the last preceding section shall be made at such times and in such manner as the executor in his discretion thinks fit;

* Doctrine of Conversion—see *ante* Sec. 79 (s) § 3 F. note.

(1) Sec. 14 L. of Eng. § 705, p. 303.

(2) Wms. 1216, 10th Edn. Jarman 1467, 1476, 6th Edn.

(3) Jarman 1467.

(4) See Wms. 1397—98.

and, until such conversion and investment shall be completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of six per cent. per annum upon the market-value (to be computed as of the date of the testator's death) of such part of the fund as shall not yet have been so invested.

Interest payable
until investment.

"In his discretion."—See sec. 90 (P) § 14 *ante*.

The interest allowed by the corresponding section of the Succession Act, is 4 per cent.

243. ^{127 (P)}_{308 (S)}.—Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge by whom, or by whose District Delegate, the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards;

Procedure where
minor entitled to
immediate payment
or possession of be-
quest, and no direc-
tion to pay to person
on his behalf.

and, if the legatee be a ward of the Court of Wards, the legacy shall be paid into that Court to his account;

and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid;

and such money, when paid in, shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

NOTES AND COMMENTARIES.

§ 1. *Practice in England.*§ 3. "*Shall pay or deliver the same.*"§ 2. "*And there is no direction in the will.*"§ 4. *Miscellaneous.*

§ 1. **Practice in England.**—In England, "it is a general rule, that, where a legatee is an infant, and would be entitled to receive the legacy, if he were of age, the executor is not justified in paying it either to the infant, or to the father, or any other relation of the infant, on this account, without the sanction of a Court of Equity, and even in the case of a child who has attained majority, payment to the father is not good, unless it be made by the consent of the child, or confirmed by his subsequent ratification" [see *Cooper v. Thornton*, 3 Bro. C. C. 97] (1).

Under section 32 of the Official Trustee's Act (Act XVII of 1864), an executor, or administrator may in such cases, pay the legacy to the Official Trustee.

§ 2. "**And there is no direction in the will.**"—But if there is an express direction in the will not to pay the legacy to the child, as when the bequest is made to a trustee for him, the executor will be justified in paying the money to the person so appointed. So if the testator order the sum to be paid to the father, he will be a trustee for his child, and entitled to receive the money (2).

§ 3. "**Shall pay or deliver the same.**"—"The same," i.e., the whole legacy. For, "An executor cannot, without risk, pay any *part* of a legacy bequeathed to an infant, either to the infant or any person for his use. Therefore, the executor is not justified in applying any part of the *capital* of the legacy for the maintenance or advancement of the child, or any other purpose than mere necessities, without the sanction of the Court. But with respect to the *interest* of the sum bequeathed, it would seem, that the executor may apply a requisite part of it for the support of the infant legatee, without the authority of the testator. The principle is, that if an executor, do without application, what the Court would have approved, he shall not be called upon to account, and forced to undo that, merely because it was done without application" (3).

The general rule for the guidance of the Court in granting maintenance, may be laid down in the following words:—"that where a bequest is vested and immediate, so that the legatee, if he were of age, would be entitled to receive his legacy at the end of the year from the testator's death, the Court will order maintenance out of the interest of the legacy, although no express provision be made for the maintenance, and even though the income be expressly directed to accumulate; provided the parents of the infant legatee are unable to maintain him. But no such allowance will be made by the Court, if the parents be of ability. And it is clear that no maintenance will be ordered out of the interest where the legacy is contingent, unless, perhaps, by consent of the legatees, in instances where they are competent to give it" (4).

(1) Wms. 1411.

(2) Wms. 1412-13.

(3) Wms. 1414-15.

(4) Wms. 1416-18.

§ 4. **Miscellaneous.**—It seems this rule is applicable to cases where the testator is one other than the parent of the infant (1).

As regards cases where the testator is the parent, or in *loco parentis*, the rule is, that, "whether the legacy be contingent, or vested interest on the legacy shall be allowed as a maintenance from the time of death of the testator." (2).

The executor is not bound to pay the legacy into the District Court, or into the Court of Wards, until the expiration of a year from the testator's death. See sec. 117 (P), *ante*.

(1) Wms. 1416.

(2) Wms. 1416.

CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.

244. ^{309 (s)} **128 (P).**—The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.
Legatee's title to produce of specific legacy.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy.

The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(a) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of B.

(b) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.

(c) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death and A's completing 18, forms part of the residue.

NOTES AND COMMENTARIES.

"Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death; and consequently, from that period, whatever produce accrues upon them, and nothing more or less, belongs to the legatee [*Sleech v. Thorington*, 2 Ves. Sen. 563]. Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator. It is immaterial whether the enjoyment of the principal is postponed by the testator or not" (1).

Hence specific legatees of cows, mares, or ewes, are entitled to the broad fallen between the death of the testator and their delivery by the executor. "So also as to the wool of sheep shorn, &c." (2). See illus. (a).

(1) Wms. 1499; 2 Rep Leg. 227, 3rd Edn.

(2) Wms. 1499-30.

245. 129 (P).^{310 (s)}—The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Residuary legatee's title to produce of residuary fund.

Exception.—A general residuary bequest, contingent in its terms, does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy.

Such income goes as undisposed of.

Illustrations.

(a) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(b) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

NOTES AND COMMENTARIES.

§ 1. “*Exception.*”—“With respect to contingent legacies, as well particular as residuary, interest is not due to the legatee until the time of payment arrives” (1).

§ 2. *Illustration (b).*—The meaning of illustration (b) is, that the income “falls into the residue to accumulate for the benefit of the residuary legatee, or for the executors or next-of kin of the testator upon the event of the residuary legatee's death before the legacy vests in him, or for such other person as may on that contingency be named to take” [*Green v. Ehins* 2 Atk. 472] (2).

246. 130 (P).^{311 (s)}—Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.

Interest when no time fixed for payment of general legacy.

Exceptions.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(1) 2 *Rop. Leg.* 279.

(2) *Ibid* 280; *Theob.* 129, 3rd Edn.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

NOTES AND COMMENTARIES.

- § 1. *Reason of the rule.*
 § 2. *Exception (i).*
 § 3. *Exception (ii).*

- § 4. *Exception (iii).*
 § 5. *Bequeathed to a minor.*
 § 6. *Interest on demonstrative legacy.*

§ 1. **Reason of the rule.**—Section 117 (P), *ante*, allows the executor one year's time from the testator's death to ascertain and settle his affairs. At the end of this period a presumption arises to the effect that, all debts, &c. of the deceased have been satisfied and that the executor is able to apply the residue among the legatees. Before this period, therefore, a general legacy is not due, nor can the legatee claim it; and hence, where no time is fixed by the will, interest begins to run from the expiration of one year from the testator's death [*Wood v. Penoyre*, 13 Ves. 333, 334]; and for the same reason, no interest is payable from an earlier date, "although there is a direction in the will to pay the legacy 'as soon as possible.'" [*Webster v. Hale*, 8 Ves 410; *Benson v. Maude*, 6 Mad. 15] (1).

§ 2. **Exception (i).**—This is *Clarke v. Sewell* (3 Atk. 99) in which it has been ruled that where the legacy is in satisfaction of a debt of the testator interest is payable from the testator's death [see *Rajamannar v. Venkata Krishnayya*, I. L. R. 25 M. 361, 12 M. L. J. 183]. But it is not so payable, where the legacy is in satisfaction of the debt of another person [*Askew v. Thompson*, 4 K. & J. 620] (2).

Legacy "in satisfaction of a debt."—A testator provided—"My elder brother Ry. V. K. G's self-acquisition to the extent of Rs. 10,000 is kept with me. So that money should be given to him." In a suit for the recovery of the money the contention was that the sum was not a legacy, but either a loan to the deceased testator, or a deposit repayable on demand. But it was held, that the said sum of Rs. 10,000 was a legacy in satisfaction of the indebtedness of the testator to the plaintiff. Mr. Justice Davies and Mr. Justice Moore said:—"The mere fact that it finds place in a will not payable to the plaintiff till the testator's death, and is a round sum without any provision for interest, negatives the idea that it was a direction to the executors to pay a just and lawful debt" [*Rajamannar v. Venkatakrishnayya*, *supra*].

§ 3. **Exception (ii).**—This is in accordance with *Wilson v. Maddison* (2 Y. and C. C. 372) which lays down that, where the testator is the father or

(1) Wms. 1430; Theob. 132, 3rd Edn.; 165, 5th Edn.

(2) Wms. 1431; Theob. 133, 3rd Edn.; 166, 5th Edn.

in *loco parentis* to the legatee, who is a minor, interest will run from the death of the testator. "For a parent or person who has put himself in *loco parentis* is under a natural obligation to provide a present, as well as a future, maintenance for the child" [*Crickett v. Dolby*, 3 Ves. 13] (1).

But if the infant is *in ventre sa mere* i.e. in his mother's womb at the testator's death, interest will run only from his birth [*Rawlins v. Rawlins*, 2 Cox. 425] (2).

It may be noted that there is nothing in the context as to whether the legatee contemplated by the exception is a minor or an adult. This may be compared with the exception appended to the next following section, i. e., section 131 (P), in which the words "and the legatee is a minor" occur.

§ 4. Exception (iii).—So in William's Executors:—"where a testator bequeaths a sum of money to an infant and directs that his maintenance shall be paid out of the interest of that sum, the payment of interest will be allowed from the death, and not be postponed, till the end of one year after" [See *In re Richards* L. R. 8 Eq. Ca. 119; *Newman v. Bateson*; 3 Sw, 689; *Chidgey v. Whitby*, 41 L. J. Ch. 699] (3).

"This exception, however, is confined to legacies in favor of infants, and has never been extended to a legacy given to an adult [*Raven v. Waite* 1 Sw, 553; *Wall v. Wall*, 15 sim. 513.] Nor does it apply to the case of a wife" [*Stent v. Robinson*, 12 ves 461; *In re Percy*, 24 Ch. D. 616] (4). This exception does not apply where the gift is not made to the infant directly. Thus, where a testator gave the income of a legacy to his daughter-in-law, during her widowhood, subject to the obligation of maintaining and educating her children, it was held that the legacy did not carry interest, from the date of the testator's death. [*Re Crane*; *Adams v. Crane* (1908) 1 Ch. 379].

§ 5. "Bequeathed to a minor."—These words seem to mean any minor whether related to the testator or not.

§ 6. Interest on demonstrative legacy.—The absence of a distinct provision, in regard to the payment of interest on demonstrative legacy, does not imply an intention to disallow, interest on such legacies. As pointed out in *Mullins v. Smith* [1 Dr. and Sm. 204] in the matter of interest demonstrative legacies are to be viewed as of the nature of general legacies.

247. 131 (P).
312 (s).—Where a time has been fixed for the pay-

Interest when time
fixed.

ment of a general legacy, interest begins to run from the time so fixed. The interest up to such time, forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or more remote ancestor of the legatee, or has put himself in the

(1) *Ibid.*

(2) Wms. 1435 F. n.; Theob. 133, 3rd Edn.; 166, 5th Edn.

(3) Wms. 1431; Theob. 133, 134, 3d Edn.; 168, 5th Edn.

(4) Wms. 1431; Theob. 166, 5th Edn.

place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for the maintenance, or unless the will contains a direction to the contrary.

NOTES AND COMMENTARIES.

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|---|---|
| § 1. <i>The general rule.</i> | § 4. <i>Where payment is postponed.</i> |
| § 2. <i>Exception.</i> | § 5. <i>Where interest allowed.</i> |
| § 3. <i>Where a specific sum is given for maintenance and the legatee is the child of the testator.</i> | |

§ 1. **The general rule.**—Where the time of payment is fixed by testator the general rule is, that the legacies will not carry interest before the arrival of the appointed time, as for instance, when the legatee shall attain twenty one. And it makes no difference whether the legacy is vested or contingent. [*Heath v. Perry*, 3 Atk. 101] (1).

§ 2. **Exception.**—Under this section, interest will be allowed, as a maintenance, provided there is no other provision in the will for that purpose. [*Wynch v. Wynch*, 1 Cox. 433 ; *Harvey v. Harvey*, 2 P. W. 21 ; See also *Raven v. Waite*, 1 Sw. 553 ; *Wall v. Wall*, 15 Sim. 513] (2).

§ 3. **Where Specific sum is given for maintenance and the legatee is the child of the testator.**—In case the legatee is the testator's child and a specific sum is bequeathed to him for maintenance, no greater allowance can be claimed for that purpose, although it be less than the usual rate of interest upon the legacy. [*Harle v. Greenbank*, 3 Atk. 716]. But the Court may increase the allowance where it is insufficient for a reasonable maintenance, and the legacy is vested. [*Aynsworth v. Pratchett* ; 13 Ves. 321 ; *Turner v. Turner*, 4 Sim. 430] (3).

§ 4. **Where payment is postponed.**—Where the legacy is in the nature of a future gift of principal "with interest," and the payment is postponed, as until the legatee attains twenty-one, interest is calculated from the end of a year after the testator's death [*Knight v. Knight*, 2 Sim. and Stu. 490] (4).

§ 5. **Where interest allowed**—See *Jitlul Mahata v. Binda Bibi*, I. L. R. 16 C., 549.

248. 132 (P).—The rate of interest

Rate of interest. 313 (S)
shall be six per cent. per annum.

(1) Wms. 1434 ; Theob. 133, 3rd Edn. ; 167, 5th Edn.
 (2) Wms. 1435 ; Theob. 134, 3rd Edn. ; 166, 5th Edn.
 (3) Wms. 1435.
 (4) Wms. 1436 ; Theob. 135, 3rd Edn. ; 168, 5th Edn.

249. 133 (P)
^{314 (s)}.—No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

No interest on arrears of annuity within first year after testator's death.

If interest on the arrears of an annuity is to be paid at all, it must be computed from the end of one year after the testator's death (1). See sec. 118 (P), *ante* *

250. 134 (P)
^{315 (s)}.—Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

Interest on sum to be invested to produce annuity.

Here the interest is payable, as representing the annuity, which is considered, where no time is fixed for its commencement, as beginning from the testator's death. See section 118 (P) *ante*, and Stoke's Succession Act P. 193.

(1) Wms. 1433.

CHAPTER XII.*

OF THE REFUNDING OF LEGACIES.

251. **135 (P)**.—An executor who has paid a legacy under the order of a Judge, is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

Refund of legacy paid under Judge's order.

NOTES AND COMMENTARIES.

§ 1. *A legatee is bound to refund:—*

- (i) *Where the executor can compel him to refund;*
- (ii) *Where a creditor may exercise that right;*
- (iii) *Where one legatee can make another refund.*

§ 2. **The section.**—This section treats of the first, that is, cases where the executor can compel a legatee to refund. The general rule is that, whenever an executor pays a legacy the presumption being, that he has sufficient to pay all legacies, the Court will oblige him, if solvent, to pay the rest; and it will not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund [*Orr v. Kaines*, 2 ves. Sen. 194] (1).

§ 3. **Where payment of legacy by suit.**—But where the payment of the legacy by the executor is under the compulsion of a suit, he is entitled to compel the legatee to refund, in case of a deficiency of assets. [*Newman v. Barton*, 2 Vern 205] (2).

§ 4. **"Under the order of a Judge."**—That is, under compulsion of a suit (3).

252. **136 (P)**.—When an executor has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No refund if paid voluntarily.

See *Orr v. Kaines*, (2 Ves. Sen. 194).

* The provisions of this Chapter as to an executor apply also to an administrator with the will annexed. See sec. 148, Act V. of 1881 (App. A.)

(1) Wms 1496; Walker and Elg. 209.

(2) *Ibid.*

(3) *Ibid.*

253. 137 (P).
311 (s).

Refund when legacy becomes due on performance of condition within further time allowed.

—When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets, in such case, if further time has, under the second clause of this section, been allowed for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom, he has paid it are liable to refund the amount.

Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfillment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as is requisite to make up for the delay caused by such fraud.

The first part of this section, corresponds with section 318, and the second part with section 124 of the Indian Succession Act. See sec. 124 (s) *ante*.

254. 138 (P).
319 (s).

When each legatee compellable to refund in proportion.

—When the executor has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

So in Williams' Executors:—"If the executor pays away the assets in legacies, and *afterwards debts appear*, of which he had no previous notice, and which he is obliged to discharge, he may by a bill compel the legatees to refund." (1).

But an executor can not compel residuary legatee to refund, if he has paid over the assets with notice of a debt [*Jervis v. Wolferston* L. R. 18 Eq. 18].

A notice of a possible remote contingent liability is not sufficient to disable an executor from recovering back the assets, when it afterwards ripens into a debt. Notice of a liability on shares will not prevent executors calling on legatees to refund, for a liability on shares does not become a debt until a call is made [*Whittaker v. Kershaw*, (1890) 145 C. D. 320].

255. 139 (P).
320 (s)—Where an executor or administrator has given such notices as the High Court may, by any general rule to be made from time to time, prescribe, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he has not had notice at the time of such distribution;

but nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

Creditor may follow assets.

See next section.

NOTES AND COMMENTARIES.

1. *The section.*
2. *The principle.*

- § 3. *Notice.*
- § 4. *"And others."*

§ 1. The Section.—This section is modelled upon section 29 of Stat. 22 and 23 Vict. c. 35 (The Law of Property Amendment Act, 1859), which enacts as follows:—

"Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or any part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

This section corresponds with section 320 of the Indian Succession Act, with slight alterations as to the notices to be given. Under section 320, the notices instead of being such as the High Court may from time to time prescribe, are to be such as would have been given by the High Court in an administration suit.

§ 2. The principle.—The principle embodied in this section is, in the words of Vice-Chancellor Malins, in [*Clegg v. Rowland* 1867 L. R. 3 Eq. 368], “that the remedy is against those who have *received* the assets, and not against those who have *parted* with them.” (1)

§ 3. Notice.—The Calcutta High Court has prescribed the following form of notice:—

“Pursuant to a decree [*or an order*] of the High Court of Judicature at Fort William in Bengal, in its Original Civil Jurisdiction, made in [*set out the number and title of the suit or title of the matter*], the creditors of A. B. late of—[residence and additions, as thus: No 6, Park Street, in the town of Calcutta, merchant], who died in or about the month of 19 , are, on or before the day of 19 , to send to the office of the Registrar of this Court, on its Original Side, their names, addresses, and descriptions, the full particulars of the claims, a statement of their accounts, and the nature of the securities [if any] held by them; or in default thereof, they will be peremptorily excluded from the benefit of the said decree [*or order*].

Every creditor, holding any security, may produce or transmit the same to the Registrar, with the particulars of his claim, or shall produce the same before the Honorable Mr. Justice in the Court house, on the day of 19 , at of the clock in the noon, being the time appointed for adjudicating on the claims (2).

§ 4. “And others.”—From the wording of the form of the notice (*supra*) prescribed by the High Court it appears that the section is applicable to creditors only, and the words “and others” are superfluity. But it is submitted that perhaps such is not the case. In *Newton v. Sherry*, () it has been held under section 29 of stat 23 and 23 vict C. 35, which corresponds to this section, that section is applicable to the claims of next of kin as well as creditors. So it is laid down that “executors or administrators are entitled after taking reasonable means for ascertaining the debts owing by the dead man (and in the case of administrators, the persons properly claiming as next of kin) to distribute the balance of the estate amongst the beneficiaries and next of kin respectively.” (3)

Accordingly, this section is also applicable to the claims of next of kin and the words “and others” include them. It may be submitted that the claims of legatee are not excluded.

It seems, however, that the omission of the words “as would have been given by the High Court in an administration suit” indicate that it is

(1) Flood 474.

(2) Belchambers Rules p. 411; new Edn.

(3) Wms. 1559, 10th Edn.

discretionary with the High Court to prescribe notice either for creditors or for "others" according to the nature of each case.

256. 140 (P).—A creditor who has not received payment
321 (s)

Creditor may call
upon legatee to re-
fund.

of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies, and whether the payment of the legacy by the executor was voluntary or not.

The Section.—This section embodies the decision in *Hodges v. Waddington* (2 Ventr, 300) and other cases which purport to lay down that, "where the testator's funds at the time of his death are not sufficient to pay both debts and legacies, it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, whether the legacy was paid to him voluntarily or by compulsion; and he has the same right, although the testator's funds at the time of his death were sufficient to pay both debts and legacies." (1)

But "this right may be lost by laches, acquiescence, or such a course of dealing as would render the assertion of such right inequitable." (*Ridway v. Newstead*, 30 L. J. Ch. 889) (2).
How the right may be lost. It may also be barred by limitation. See Indian Limitation Act (Act XV of 1877) Sch. II, Art. 43, as amended by section 156, Act V of 1881. See art 27 2nd Sch. S. C. C. Act.
Limitation.

§ 2. Where a mortgage is valid against a creditor.—"If an executor who is also a residuary legatee sells or mortgages an asset of the testator for a valuable consideration to a person who has no notice of the existence of unsatisfied debt of the testator or of any ground which rendered it improper for the executor so to deal with the asset, that person's sale or mortgage is valid against any unsatisfied creditor of the testator." This is so, because, an unsatisfied creditor has no lien or charge on any assets and persons dealing with the executors in good faith are entitled to look to him alone, not being bound to ascertain that all debts and liabilities have been discharged.

[Per Ronner J. in *Graham v. Drummond*, (1896) 1 Ch. 968, comp. *Bank of Bombay v. Solomon Somji*, 12 C. W. N. 993; 1 L. R. 33 B. 1; 8 Cal. L. J. 345; 18 Mad. L. J. 435, 10 Bom. L. R. 1065; Sc. 35 L. R. I. A. 130; 5 A. L. J. 661].

But such sale or mortgage is not valid against an unsatisfied legatee. A testator left eight sons four by his first wife and four by his second wife Labai who also survived him. By his will, he left all his property to his elder sons subject to a legacy of Rs. 30000 in favour of his widow, Labai, his younger sons, which was

(1) Wms. 1457; Section 979.

(2) *Ibid.*

found to be a charge upon the property in suit. Some fifteen years, after the death of the testator, his elder sons who were also executors, mortgaged this property to the Bank of Bombay to secure their private debt which yet, the said legacy of Rs. 30000 remained unsatisfied. In a suit by the younger sons, to establish their priority of their charge over that of the mortgagee Bank, it was found as a fact that the latter had constructive notice of the plaintiff's charge having made no enquiry as to the title of the mortgagers and it was held that the plaintiffs were entitled to the priority [*Bank of Bombay v. Soleman*; 12 C. W. N. 993 P. C.] In distinguishing this case from *Graham v. Drummand* [(1896) 1 Ch. 968] in which the creditor sought to impugn the alienation their Lordships pointed out, the distinctions between the claims of a legatee and a creditor, citing the following passage from Spence's. "Equitable Jurisdiction."

"A mortgage by an executor who is also a residuary legatee to secure his private debt, may be set aside even at the suit of the pecuniary legatee for the nature of the claims, of the legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed, since the death of the testators and then the executor deals with the residue, as his own, the purchaser may in the absence of a notice to the contrary, assume that the debts have been paid or that there are other assets, for payments of the debts if any, therefore, the mortgagee would be safe as against, creditors."

257. 141 (P).
322 (s).—If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund, under the last preceding

When legatee, not satisfied or compelled to refund under section 140, cannot oblige one paid in full to refund.

section, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

258. 142 (P).
323 (s).—If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed

When unsatisfied legatee must first proceed against executor, if solvent.

against the executor if he is solvent; but, if the executor is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

NOTES AND COMMENTARIES.

Secs. 141 (P) and 142 (P).

§ 1. *The Section.*§ 2. *Reason of the rule.*

§ 1. The Section :—The substance of these two sections may be given in the following words :—

"If the assets were originally sufficient to satisfy all the legacies and afterwards, by the wasting of the executor there is a deficiency, an unsatisfied legatee cannot oblige a satisfied one to refund, whether the legacy was paid him with or without suit. *A fortiori*, there can be no such right, (that is, "no right on the part of the unpaid legatee for a contribution), where the loss of the assets has occurred, not by the conduct of the executor, but from merely accidental circumstances. [*Fenwick v. Clarke* (1862) 1 De G. F & J 240, 31 L. J Ch 728]. But if the assets were not originally sufficient to pay all the legacies, and one legatee receives his legacy in full, in that case, the unsatisfied legatees may compel the one so paid to refund" (1) [*Walcot v. Hall* (1788) 1 P. Weirs, 495; 2 Bro. C.C. 305].

§ 2. Reason of the rule :—As to the reason of the rule, it is to be observed that, where the assets were sufficient, the legatee having received no more than he was entitled to, is deemed not liable to refund; where as in the other case, *i.e.* where the assets were not sufficient, the legatee having received more than he was entitled to. [Sec Section 107 (P), *ante*.] becomes liable to refund. In the former case, there is this further reason that, "where the executor has committed *devastavit*, the legatee—retains the advantage of his legal diligence which the other legatees neglected by not bringing their suits in time, before the wasting by the executor," the maxim being, *vigilantibus non dormientibus Jura subveniunt* (The laws assist those who are vigilant, not those who sleep over their rights). Even where the legatee has rendered himself liable to refund, the un-satisfied legatees are required in the first place to proceed against the executor, if he is solvent, for he "by paying the one legacy, has admitted assets to pay all". [*Orr v. Kaines*, 2 Ves. Sen. 194]. Besides, the assets being deficient, the payment in full to one legatee is a *devastavit* by the executor. And if the executor be insolvent and unable to pay, "then, as it is a rule of equity that upon a deficiency of assets all general legatees, shall proportionately abate, the Court will entertain a suit by the unsatisfied legatee to compel him who has been paid to refund." (2)

"If the assets had become deficient before the satisfied legatee was paid, it would seem, in England at least, that the unsatisfied legatees may call upon him to refund". But if assets are wasted after one of several legatees has received his share then he is not bound to refund [*Peterson v. Peterson* L. R. 3 Eq. III; *In re Lepine*; *Dowsett v. Culver*, (1892) 1 Ch. 210]. (3)

259. 143 (P).—The 'refunding' of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Limit to refunding
of one legatee to
another.

(1) Wms. 1458, 8th Edn. 1190 10th Edn. See Hend T. S. 232 2nd Edition.

(2) Hend T. S. 232, 233. 2nd Edn., Wms. 1458, Stokes 195, 196.

(3) Hend T. S. 232 2nd Edn; Theob 575, 3rd Edn; 740 5th Edn.

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1200 rupees, and if properly administered would give 200 rupees to B, 400 rupees to C and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund so rupees and D to refund 120 rupees.

Refunding to be without interest. **260.** $\frac{144 \text{ (P)}}{325 \text{ (S)}}$.—The refunding shall, in all cases, be without interest.

261. $\frac{145 \text{ (P)}}{326 \text{ (S)}}$.—The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

Residue after usual payments to be paid to residuary legatee.

§ 1. **The Section.**—This section corresponds with the followings words in William's executors and administrators "When the executor has paid all the debts, and all the legacies hereto before mentioned, he must, in the last place, pay over the surplus or residue of the estate to the residuary legatee, if any such be nominated. And although the residuary legatee dies before the payment of debts, and before the amount of surplus is ascertained, yet it shall devolve on his personal representative" (1)

§ 2. **Residuary legatee when "Proprietor"** —Thus a residuary legatee is not a 'proprietor' until the administration has been completed and his interest ascertained and made over to him by the executor. *Ganoda S. Chaudhurani v. Nalini Ranjan Raha*, 12 C. W. N. 1065, 1070, 366 C. 28].

§ 3. **Residuary legatee's right** :—A residuary legatee has a right to insist that, in course of the first year after the testator's death, the executor shall if it be possible, pay the debts, legacies, funeral and testamentary expence so that the clear residue may be ascertained and paid over to him or if he has only a life interest [Sec 125 (P) *supra*.] in it may be duly secured for the benefits of the persons successively entitled. The effect of the bequest is not to vest in him, any particular asset of the testators [*Sudely (Lord, v. Att. Gen.* (1897) A C. 11]. But his substantial title is—complete at the death of the testators (2) [*Lord Chelmsford L. C. in Wrightwich v. Lord*, C. 6 H. L. C. 217 at 226]. See *Supra* sec. 117 (P).

§ 4. **When an executor is functus officio** :—Here a question may arise as to when an executor is functus officio or ceases to be executor. It is a settled rule that an executor See Sec. 98 (P), does not cease to be executor as

(1) Wms. 1460, 8th Edn.; 1192 10th Edn.

(2) *Ing.* 501.

soon as the debts, pecuniary legacies, funeral and testamentary expenses are paid or discharged, if the residue be not ascertained or distributed [*Solomon v. Attenborough* (1911) 2 Ch. 159]. For the most part, the executorial duties consist in ascertaining, the proper net amount of the various parts of the testator's property, after payment of debts and expenses and distributing them amongst the persons entitled; these persons may be trustees or the executors themselves may be and frequently are, the trustees who receive or retain as trustees the fund ascertained by themselves as executors [Per Romilly M. R. in *Lord Brougham v. Lord W. Poulatt* () 19 Beav. 134]. Where therefore the residue has not been ascertained it is impossible to fix on the executor the character of a trustee of a specified fund [*Davenport v. Stafford* () 14 Beav. 331].

When the estate has been fully administered the executor retaining the legacy in his hands, not as assets of the testator, but as trustee of the legacy, he is no longer clothed with the character of executor, but is, in respect of such legacy, a mere trustee *Byrchell v. Bradford* () 6 Mad. 240].

So where after payment of debts and legacies, he has purchased stock to answer an annuity and paid the interest to the annuitant [*Ex parte Dover v.* () 5 Sim 500] or invested the residue upon the trust of the will [*Ex parte Wilkinson* () 3 Mont and A. 145], he is *if so facto* a trustee. The latest case as to the time when an executor becomes a trustee is *Re Tenimis* (1902) 1 Ch. 176. See *ante* sec. 7 (P) § 4 and also sec. 115 (P) § 4.

262. 145 A (P)
326 A (s).—Where a person not having his domicile in British India has died leaving assets both in British India and in the country in which he had his domicile at the time of his death,

Transfer of assets from British India to executor or administrator in country of domicile for distribution.

and there have been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country,

the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 139 and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of,

may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the

consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

This section was added by section 16 of Act II of 1890.

See *ante* Sec. 207 (S) and also Sec. 41 A Act II 1874 which corresponds with this, as Sec. 325 A (S) does. Sec. 41 A was added also by Act II of 1890 Sec. 12.

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

263. 146 (P)
327 (S).—When an executor or administrator, mis-
applies, the estate of the deceased, or subjects
it to loss or damage, he is liable to make
good the loss or damage so occasioned.

**Liability of execu-
tor or administrator
for devastation.**

Illustrations.

(a) The executor pays out of the estate an unfounded claim. He is liable to make good the loss caused by the payment.

(b) The deceased had a valuable lease, renewable by notice, which the executor neglects to give at the proper time. The executor is liable to make good the loss caused by the neglect.

(c) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

NOTES AND COMMENTARIES.

§ 1. *Preliminary.*

§ 2. *Liability for misapplication.*

§ 3. *Liability for direct acts of abuse.*

§ 4. *Liability of an executor for the devastation of his co-executor.*

§ 1. **Preliminary.**—A *devastavit* is when an executor or administrator “doth misemploy the estate of the deceased and misdemean himself in the managing thereof against the trust reposed in him.” (1) It is that species of misconduct or neglect of duty for which an executor or administrator is personally liable. (2)

The section seems to proceed upon two principles: (a) that in order that persons may not be deterred from undertaking these offices the Court is extremely liberal in making every possible allowance; (b) that it is the duty of the Court to carefully guard against any abuse of their trust. (3)

All direct acts of abuse and maladministration come within the operation of this section; so that, the word “misapplies” seems to refer to maladministration, and the words “subjects it to loss or damage,” to direct acts of abuse. (4)

(1) *Shep: Touch* 486.

(2) *Wms.* 1803.

(3) *Wms.* 1804.

(4) *Wms.* 1804-5.

§ 2. Liability for Misapplication.—An executor or administrator is liable for misapplication or maladministration in the following cases :—

(i) Where he misapplies the assets in undue expenses for the funeral [*Handcock v. Podmore*, 1 Barn. and Add. 260] (1).

(ii) Where he pays debts out of their legal order, to the prejudice of such as are superior, and of which the executor had notice (2). See sections 101 (P) to 103 (P), *ante*.

(iii) Where he assents to or pays a legacy when there is not a fund sufficient for creditors (3). [See *Knatchbull v. Fearnhead* : 3 My. & Cr. 122].

(iv) Where he releases a cause of action founded on a wrong accruing in the testator's lifetime, or releases or compounds a debt due to the testator (4). But although an executor, generally speaking, is answerable for releasing or compounding a debt, yet if it appears to have been for the benefit of the estate, he will be excused. [See *Blue v. Marshall* 3 P. Wms. 381] (5).

§ 3. Liability for direct acts of abuse.—An executor or administrator is liable under this head,—

(i) If he applies the assets to the satisfaction of his own debt to a third party [see *Nugent v. Gifford*, 1 Atk. 463 ; *Scott v. Tyler*, 2 Dick. 725] (6) or otherwise misappropriated [*T. Nagarathuminal v. P. Namasivaya* (1910) 7 Mad. L. J. 123].

(ii) If he collusively sells the testator's goods at an under-value [*Rice v. Gordon*, 11 Beav. 265] (7)

(iii) If he applies the assets in payment of an unfounded claim or a claim which is not enforceable [see *Manning v. Purcell*, 7 De G. M. and G. 55], though he may pay a barred debt [*Norton v. Freker*, 1 Atk. 526] (8).

(iv) If he risks the funds of an estate by mixing them with his own, and employs them for his own purposes, even temporarily. [*In re Cowie*, 1 L. R., 6 C., at 70 ; 7 C. L. R. at 26].

The son of a deceased executor is not liable for claims against his father
Executor's son not in his capacity of executor [*Imlach v. Syud Abdoollah*
liable. Cal. S. D. A. Decision, 15th July 1847].

A devastavit is a personal wrong (9).

It may be observed that, when executors deal with assets, not for the purpose of the will, but apply them to their own private purposes a person taking the assets with knowledge, that they are so applied, is a party to the devastation and the assets in his hands could be followed by pecuniary legatees prejudiced

(1) Shep. Touch 486 ; Wms. 1805, 974 ; Walker & Elg. 236.

(2) Shep. Touch 486 ; Wms. 1805, 993 ; 9 Camp. R. C. 323.

(3) Shep. Touch 486 ; Wms. 1805, 1346.

(4) Wms. 1806, 1807.

(5) Wms. 1808.

(6) Wms. 1804 ; Walker and Elg. 152

(7) *Ibid.*

(8) Wms. 1800, 1810.

(9) 9 Camp. R. C. 325.

by the improper dealing of the assets [*Goolam Hossein v. Bank of Bombay, & Suleman v. Rohimtula*, 7 Bom. L. R. 407, S. C. nom. *Bank of Bombay v. Suleman*, 12 C. W. W. 993, P. C. I. L. R. 33 B. 1, 8 Cal. L. J. 345, 18 Mad. L. J. 435; 10 Bom. L. R. 1065, 35 L. R. I. A. 130, 5 A. L. J. 661.]

§ 4. Liability of an executor for the devastavit of his co-executor :—As a general rule, one of two co-executors or administrators shall not be liable for the devastavit of another, unless he has intentionally or otherwise contributed to it [*Satya Kumar Bannerjee v. Satya Kripal Bannerjee* 10 C. L. J. 503; *Longford v. Gascoyne*, 11 ves 333; see also—*Mahomed Ahmed v. Pedro, Salvadore Rodrigues*, 7 B. L. R. 691, *Hugg v. Greenway*, Coryton 97, Bourke. A. O. C. 111; 2 Hyde 3,] or being cognizant of it, he took no steps to prevent a loss to the estate. For the fact for the executor's having misplaced his confidence in one, cannot be held to operate to the prejudice of the other. [*Satya Kumar Bannerjee v. Satya Kripal Bannerjee*, *supra*, *Williams v. Nixon* (1840) 2 Beav. 472]. Hence an executor shall not be ordinarily responsible for the assets collected by his co-executors.

[*Longford v. Gascoyne*, *supra*]; nor shall he be guilty of devastavit by paying an inferior debt, when notice of the existence of a superior debt had been concealed from him by his co-executors (1); although notice to one, is, in the absence of anything, to the contrary, presumed to be communicated to the other. But if an executor in any way contributes to enable his co-executor to have possession and control of the assets [*Hewitt v. Foster*, 6 Beav 259] or stands by and sees his co-executor commit a breach of the trust (Mac & G. 422 *Styles v. Grey*, *Horton v. Brockleyhurst*, *Supra* 29. Beav. 564 he becomes responsible. [See *Mahomed Ahmed v. Pedro Salvadore Rodrigues* 7 Bom. L. R. 691. *Satya Kumar Bannerjee v. Satya Kripal Bannerjee*, *Supra*. It is the duty of all executors to watch over and if-necessary to correct the conduct of each other, for otherwise one may be held responsible for the devastavit of the other [*Satya Kumar v. Satya Kripal*, *Supra*, *Styles v. Grey* (1848) 1 Mac & G. 422 *Horton v. Brockleyhurst* (1858) 29 Beav 564].

Where a testator by his will committed the—management of his property to his widow along with two out of five executors including the widow it is not open to one of the executors who was not specifically entrusted with the management to contend for the purpose of avoiding liability as executor that his duties were purely advisory, that he was but one of many, that votes of the majority of the executors governed and the real management was entrusted to two of the executors in co-operation with the widow [*Lakhmi Chand Nim Chand v. Joy Kuvarboi*, I.L.R. 29 B, 170, 6 Bom. L.R. 907].

The indemnity clause of Section 30 of the Trust Act (II of 1882) casts the onus of proof on those who seek to charge a trustee with loss arising from the default of an agent when the propriety of employing an agent has been established. But where there is clear breach of duty in the employment and supervision of the agent, the liability of the trustee for breach of trust arises (*Ibid*).

Liability of executor standing by :—But an executor is not—responsible when the act of devastavit is—committed with the concurrence of the injured parties or their acquiescence without original concurrence [*Griffith v. Poser* (1858)

25 Beav 236]. In such cases however, the court must enquire into all the circumstances which induced concurrence or acquiescence to ascertain its validity and genuineness [*Walkers v. Symonds* (1818), 3 Swust 1, *Burrows v. Walls* (1855), 5 De G. M. & G. 233, *Davies v. Hodgson* (1857) 25 Beav 177; *Re Baker* (1882) 20 C. D 230, *Re Hulkes* (1886) 33 C. D 552 *Dixon v. Dixon* (1879) 9 C. D, 587] (1). Estoppel :—where an entry was made by a person in his—account book, in favour of his wife to show that he made a gift to her of Rs. 75000 and with the knowledge of all the members of his family, such entry was repeated as a debt due to the lady and after his death, some of his sons took out letters of administration and with the consent of the respondent's son paid the money to their mother and for seven years the respondent made no objection, it was held that the respondent was estopped by his conduct and could not question the validity of the payment. [*Ardeshier v. Mancher Show* (1909) 12 Bom L.R 53].

Concurrence and acquiescence of injured party.—Neglect to sue for years—What weight it carries in questions of concurrence and acquiescence [See *Re Birch* (1885), 27 C. D 622 *Sleeman v. Wilson* (1872) L.R 13 Eq 36].

264. 147 (P).—When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

For neglect to get in any part of property.

Illustrations.

(a) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount so lost.

(b) The executor neglects to sue for a debt, till the debtor is able to plead the Act for the limitation of suits and the debt is thereby lost to the estate. The executor is liable to make good the amount of the debt.

NOTES AND COMMENTARIES.

§ 1. *The section.*

§ 2. *Examples.*

§ 3. *Neglect to take probate or such as amounts to fraud.*

§ 4. *Where executors and administrators are entitled to indulgence.*

§ 5. *Legal advice—no protection to executors or administrators.*

§ 6. *Removal of executor.*

§ 1. **The section.**—This section governs all such acts of negligence or careless administration, as defeat the rights of creditors, or legatees, or parties entitled in distribution.

§ 2. Examples—Thus an executor is liable where he, for more than a year, after the testator's death, allows a considerable portion of the assets to lie unproductive in the hands of a banker who fails [*Moyle v. Moyle*, 3 Russ. and My. 710]; or leaves an ascertained residue in his co-executor's hands who becomes bankrupt [*Lincoln v. Wright*, 4 Beav. 427]; or neglects to call in the money due on a bond to the testator, without enquiring into the circumstances and situation of the obligor, and thereby permits the money to remain upon personal security [*Powell v. Evans*, 5 Ves. 832]. Similarly an executor is responsible if he omits to invest according to the will [*Robinson v. Robinson*, 1 De G. M. and G. 247]; or without any judicial authority makes over the estate to those whom he supposes to be, but who in fact are not, entitled to the same [*Turner v. Maule*, 3 De G. and Sm. 497; *Powell v. Hulkes*, L. R. 33 Ch. D. 552]. So an executor will be liable if he unnecessarily keeps his testator's money dead in his own hands (1).

One Homjibhai obtained a mortgage-degree against Hormajsha, the son of the mortgagor, in his representative capacity, he having obtained letters of administration to the estate of the deceased, and in execution thereof purchased the mortgaged property himself for Rs. 810. This decree being reversed on appeal, the decree-holder entered into a compromise with the defendant by the terms of which the latter relinquished his claim to the right, which had accrued due to him under the appellate Court decree, of taking back from the former the said amount in consideration of Rs. 240 only, on account of his costs. In a suit to set aside this compromise, it was held, that the defendant administrator was guilty of *devastavit* to the extent of Rs. 810 for which he was personally liable under this section [*Khusrubhai Nasorvanji v. Harmajsha Phirozsha*, I. L. R. 17 B. 637].

§ 3. Neglect to take probate or such as amount to fraud.—No action would lie against an executor for neglect to take out probate [*In re Stevens*; *Cooke v. Stevens* (1898) L. R. 1 Ch. 162, *per* V. Williams L. J.]. As to executor's ignorance and neglect of duty amounting to fraud, see *Bibee Solomon v. Abdool Azees*, I. L. R. 6 C. 687; 8 C. L. R. 169.

§ 4. Where executors or administrators are entitled to indulgence.—In as much as executors are very often called upon to execute very onerous and difficult trusts, they have been held to be entitled to great indulgence, unless neglect is possibly proved [See *Powell v. Evans* 5 Ves 843—*per* Arden, M. R.]. Accordingly, in a case where an executor acted in the honest exercise of his discretion as to time of selling property of a very uncertain and speculative character, it was laid down that he ought not to be made personally responsible for loss arising from his not having sold within 12 months. [*Marsden v. Kent*, L. R. 5 Ch. D. 598]. So in *Selby v. Bowie*, [4 Giff 300; 11 W. R. Eng; 559] Knight Bruce L. J. said "Where an executor acts honestly; it is not every act of imprudence, nor every act of bad management, that is sufficient to charge him. There must, in each case, be some gross act of what the law calls wilful default some gross and striking in attention to his duty through which loss has been sustained by those for whom he is trustee." [See *Lord De Clifford v. Marquis of Landsdowne* (1909) 2 Ch. 707. where the

executors acted honestly and reasonably, and were excused and relieved from personal liability] (1).

It follows therefore, that an executor will not be liable when the very will, he has to administer, is misleading. Thus it has been held in India that no Court of Equity would hold an executor liable for *devastavit*, if the will is so framed as to mislead him and he is not called upon to act by any party taking an interest under the will differently from his own view. [*Hogg v. Greenway* 2 Hyde 3].

§ 5. Legal advice—no protection to executor or administrators.

—Counsel's advice will not protect an executor or administrator against liability for wrongful acts. It may be that an executor meant to act fairly and honestly; but he was mis-advised, the Court must proceed not upon the improper advice he may have acted upon, but upon the merit of the acts he has done. "If under the best advice he could procure he acts wrong, it is his misfortune, but public policy requires that he should be the person to suffer." [Lord Redesdale, in *Doyle v. Blake*, 2 Sch. & Lef. 243; *Re Knight's Trusts* 29 Beav 49] (2). If however the next of kin of an intestate with full knowledge of the fact but under mistake as to their legal rights authorize his administrator to pay a certain amount to a third person who is not in law entitled to it and the administrator pays accordingly he can not be held to have acted otherwise than in due course of administration [*Ardeshir v. Munchershaw* (1909) 12 Bom. L. R. 53. See *Rogers v. Ingham* (1876) L. R. 3 Ch. D. 351].

§ 6. Removal of Executor for misconduct.—Where the testator and his executor had a partnership business, and after the death of the former, the latter instead of winding it up opened on his own account another shop of the same description, the natural result of which was, that all the former customers of the partnership were attracted to his own shop and thus entirely destroyed the value of the good-will of the partnership business; it was held, this conduct of the executor coupled with others of a similar nature though less serious, was sufficient to justify the Court in removing the executor and appointing a receiver to collect and hold possession of the deceased's estate [*Hafizabai v. Kazi Abdul Karim* I. L. R. 19 B. 83]. See *ante* section 7 (P) § 11(a) & sec 4 Act. V. 1902.

As a general rule, however, the Court will not appoint a receiver against an executor on slight grounds, "because his appointment as executor shows that the testator who must be assumed to have known his character, had confidence in him, and the Court will give fullest weight to that expression of confidence and require a much stronger case to be made out for a receiver against an executor than against other persons." Hence the Court will not appoint a receiver against an executor unless gross misconduct on his part is shown (*Ibid.*) Any serious misconduct, gross management, misuse or misappropriation of funds by an irresponsible executor or administrator which imperils the estate justifies the appointment of a receiver [*Middleton v. Dodswell*, 13 Ves. 226 *Ex parte Walker* 25 Ala 81]. The relief is said to be designed to prevent future injury and not to redress past grievances [*Dougherty v. Mc. Donald*, 10 G. A. 121].

(1) Walker and Elg. 247-48; Hend 389-90.

(2) Walker & Elg. 272-73; Winn 1809 F. note.

§ 7. **Removal of Mohunt.**—Gross misconduct is a ground for removing a mohunt also. Mis-management which is detrimental to the interest of the shrine and its worshippers amounts to gross mis-conduct [*Ram Kishen v. Chet Singh*, 7 Punj L. R. 13¹]. As regards, removing a trustee however, “the main guide must be the welfare of the beneficiaries, looking to all the circumstances of the case. Neither disagreement between *Cestuiquetrust* and the trustee, nor disinclination on the part of the *Cestuiquetrust* to have the trust property remain in the hands of a particular individual is a different ground for their removal” [*Re Wrightson v. Cook* (1908) 1 Ch. 789].

APPENDIX.

—:O:—

APPENDIX A.

—O—

The sections of the Probate and Administration Act which are excluded from the Hindu Wills Act.

CHAPTER XIV.

MISCELLANEOUS.

Provisions applied to administrator with will annexed.

148. In Chapters VIII, IX, X and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed.

Saving-clause.

149. Nothing herein contained shall—

(a) validate any testamentary disposition which would otherwise have been invalid ;

(b) invalidate any such disposition which would otherwise have been valid ;

(c) deprive any person of any right of maintenance to which he would otherwise have been entitled ; or

(d) affect the rights, duties and privileges of the Administrator General of Bengal, Madras or Bombay.

Probate and administration in case of persons exempted from Succession Act to be granted only under this Act.

150. No proceedings to obtain probate of a will, or letters of administration to the estate, of any Hindu, Muhammadan, Buddhist or person exempted under section 332 of the Indian Succession Act, 1865, shall be instituted in any Court in British India except under this Act.

[151. *This section which repealed sections 15 and 16 and the proviso to section 13 of Act XXVII of 1860, has itself been repealed by Act VII of 1889 (The Succession Certificate Act).]*

152. The grant of probate or letters of administration under this Act in respect of any property shall be deemed to supersede any certificate previously granted in respect of the same property under Act No. XXVII of 1860 or Bombay Regulation No. VIII of 1827; and when at the time of the grant of such probate or letters, any suit or other proceeding instituted by the holder of such certificate regarding such property is pending, the person to whom such grant is made shall, on applying to the Court in which such suit or proceeding is pending, be entitled to take the place of such holder in such suit or proceeding:

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

[153. Repealed by Act VII of 1889].

Amendment of Hindu Wills Act, 1870. **154.** The following amendments shall be made in the Hindu Wills Act, 1870 (namely):—

(a) for the portion of section 2 commencing with the words “sections one hundred and seventy-nine” and ending with the words “administrator with the will annexed,” the words “and section one hundred and eighty-seven” shall be substituted;

(b) the third clause of section 3 and the last clause of section 6 shall be repealed;

(c) in section 6, for the words “one hundred and three and one hundred and eighty-two” the words “and one hundred and three” shall be substituted.

155. All grants of probate of the will or letters of administration to the estate of any deceased Hindu, Muhammadan or Buddhist or any person exempted under section 332 of the Indian Succession Act, 1865, which before this Act comes into force, have been made in Lower Burma (1), shall, whenever such grant would have been lawful if this Act had been in force, be deemed to have been made in accordance with law.

156. In the second schedule to the Indian Limitation Act 1877, No. 43 after the figures “321” the following shall be inserted, namely—“or under the Probate and Administration Act, 1881, section 139 or 140.”

157. (2) (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

(2) If such person wilfully and without sufficient cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment which may extend to three months, or with both.

(1) For “British Burma” read “Lower Burma” in the Burma Code—Act XX of 1886, sec. 4.

(2) This section was added by Act VI of 1889, s. 17, with a similar addition to the Succession Act.

APPENDIX B.

—:O:—

The portions of the Indian Succession Act not incorporated in the Hindu Wills Act.

ACT X OF 1865.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL.
ON THE 16th MARCH, 1865).

—O—

An Act to amend and define the Law of Intestate and Testamentary Succession in British India.

WHEREAS it is expedient to amend and define the rules of law applicable to Intestate and Testamentary Succession in British India ; It is enacted as follows :—

Preamble.

For the purpose of this Act British India includes Zanzibar, this Act except sec. 331, having been made applicable in that territory by the Zanzibar order in Council, dates 7th July 1897 [*Macleod v. Consul General Zanzibar* 8 Bomb. L. R. 725].

PART I.

Preliminary.

Short Title.

1. This Act may be cited as "The Indian Succession Act, 1865."

This Act to constitute the law of British India in cases of Intestate or Testamentary Succession.

2. Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of Intestate or Testamentary Succession.

Sec. 2. This section purports to lay down that this Act *i.e.* Act X of 1865, is of universal application in this country unless a person claiming to be excepted can show that he is specifically excepted from the operation of its provisions. [*Dagree v. Pacotti* (1895) 19 B. 783 ; *Nepembala Debi v. Siti Kanta Bannerjee* (1910) 12 Cal. L. J. 459, 15 C. W. N. 158].

So that the Courts must look to this Act and this Act alone for the law of British India applicable to all cases of succession whether testamentary or intestate, the burden of proof lying in all cases upon the plaintiff to prove the

exception provided in section 331 *Infra*. (N. B. Consult Law Commissioner's report of 1879).

Interpretation clause. 3. In this Act unless there be something repugnant in the subject or context—

Words importing the singular number include the plural : &c., &c., &c.

These definitions are given in book I, under the head "Preliminary." See p. 11, *ante*.

4. No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried. See post Sec. 331 last Sentence.

Interests and powers not acquired nor lost by marriage.

The Indian Succession Act, deals with the *devolution* of rights on intestacy ; it does not purport to enlarge the category of heritable property. The Act does not affect right of coparcenership as between those to whom it applies.

The distinction between coparcenership and inheritance is radical. In the case of inheritance, property devolves on death, it survives in the case of coparcenership ; on inheritance new rights are acquired, on survivorship, the enjoyment of existing rights is increased by the removal of one from the body of co-sharers [*Francis Ghosal v. Gabri Ghosal*, I. L. R. 31 B, 25 ; 8 Bom. L. R. 770 ; See *Abraham v. Abraham*, 19 Moo. I. A. 195 at 237].

And although, the law of survivorship, so far as it affected Native Christians, has been repealed by this Act (X. 1865) it did not take away any vested interest. Accordingly whereof two brothers A and J who were living in coparcenery when this Act came in to force and after some years, no partition having been made A died, it was held that J did not take the whole estate by right of survivorship, because the vested rights as continued till the time of his death which occurred in 1872 a case of intestacy arose by the operation of this Act, immediately on that event happening. Their Lordships (Collins C. J. and Parker J.) said "The right of survivorship pre supposes that the rule of Hindu Law is the rule of decision at the date of the coparcener's death, but the effect of the succession Act was to convert vested coparcenery rights into individual rights and to subject such rights in cases of intestacy to the rules of succession provided by that Act." [*Tellis v. Saldanta* (1885) 10 M. 69].

PART II.

DOES NOT APPLY TO HINDUS.

Of Domicile.

5. Succession to the immoveable property, in British India of a person deceased in regulated by the law of British India, where ever, he may have had his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which, he had his domicile at the time of his death.

Law regulating Succession to a deceased person's immoveable and moveable property respectively.

Sec. 5.—does not apply in respect of the moveable property of persons not having an Indian Domicile [*Miller v. Adv. Gen. of Bengal* I. L. R. 1 C; 412].

Illustrations.

(a) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.

(b) A, an English man, having his domicile in France, dies in British India, and leaves property, both moveable and immoveable in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an English man, dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.

One domicile only affects succession to moveables. 6. A person can only have one domicile, for the purpose of succession to his moveable property.

7. The domicile of origin of every person of legitimate birth is in the country in which at the time of this birth, his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Illustration.

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England whatever may be the country in which he was born.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

Continuance of domicile of origin. 9. The domicile of origin prevails until a new domicile has been acquired.

10. A man acquires a new domicile by taking up his fixed habitation in a country, which is not that of his domicile of origin.

Explanation.—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's Civil or Military Service, or in the exercise of any profession or calling.

Illustrations.

(a) A, whose domicile of origin is in England, proceeds to British India, where he settles as a Barrister or a Merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(b) A, whose domicile is in England, goes to Austria, and enters the Austrian Service, intending to remain in that service. A has acquired a domicile in Austria.

(c) A, whose domicile of origin is in France, comes to reside in British India, under an engagement with the British Indian Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(d) A, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England, as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(e) A, having gone to reside in British India, under the circumstances mentioned in the last preceding illustration afterwards alters his intention, and takes up his fixed habitation in British India. A has acquired a domicile in British India.

(f) A, whose domicile is in the French Settlement of—Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(g) A, having come to Calcutta under the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in British India.

11. Any person may acquire a domicile in British India by making and depositing in some Office in British India (to be fixed by the Local Government), a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

12. A person who is appointed by the Government of one country to be its ambassador, consul, or other representative in another country, does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with him as part of his family or as a servant.

Continuance of new domicile.

13. A new domicile continues until the former domicile has been resumed, or another has been acquired.

Minor's domicile.

14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of Her Majesty, or has set up, with the consent of the parent, in any distinct business.

Domicile acquired by a woman on marriage.

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

Wife's domicile during marriage.

16. The Wife's domicile during the marriage follows the domicile of her husband.

Exception.—The Wife's domicile no longer follows that of her husband if they be separated by the sentence of competent Court, or if the husband is undergoing sentence of transportation.

Except in cases stated minor cannot acquire a new domicile.

17. Except in the cases above provided for, a person cannot during minority acquire a new domicile.

Lunatic's acquisition of new domicile

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

Succession to a person's moveable property in British India, in absence of proof of his domicile elsewhere.

19. If a man dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

PART III.

(DOES NOT APPLY TO HINDUS NOR TO PARSEES).

*Of Consanguinity.***Kindred or Consanguinity.**

20. Kindred or consanguinity is the connexion or relation of persons descended from the same stock or common ancestor.

21. Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his farther, grandfather, and great-grandfather, and so upwards in the direct ascending line; or between a man, his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation constitutes a degree, either ascending or descending. A man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third.

22. Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other. For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock, and then downwards to the collateral relative, allowing a degree for each person, both ascending and descending.

"The Act is an English Act and XXX must be read as part of a system of law which has refused to follow even the civil law in its relative tenderness towards illegitimate children. Since the Act speaks of certain relations without more I infer that the only relations contemplated are those which the law recognizes. There can be no doubt that in an English Act of Parliament the word "child" always applies exclusively to a legitimate child. [See *Dickinson v. N. E. Railway Co.* 12 W. R. Eng. 52; *Guardian of Northwich Union v. Guardian of St. Poneras Union* 22 D. P. 11. 164]." (*Smith v. Mussey*, 1 L. R. 30 B. 500 8 Bom. L. R. 322. See Post Sec. 87 (s)).

23. For the purpose of succession, there is no distinction between those who are related to a person deceased through his father and those who are related to him through his mother; nor between those who are related to him by the full blood, and those who are related to him by the half blood; nor between those who are actually born in his lifetime, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

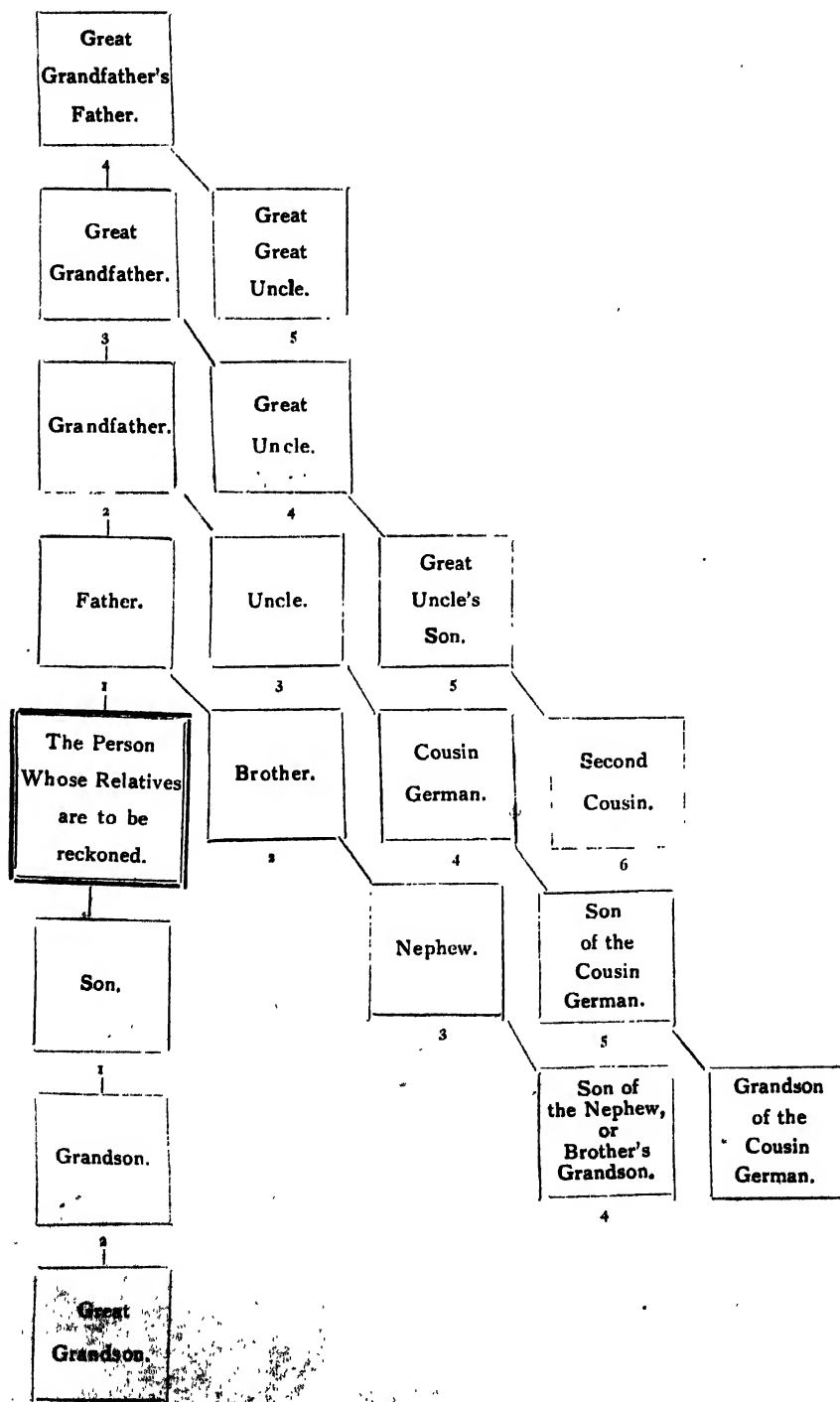
24. In the annexed table of kindred the degrees are computed as far as the sixth, and are marked by numerical degrees of kindred figures.

The person whose relatives are to be reckoned, and his cousin german, or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor the grandfather; and from him one of descent to the uncle, and another to the cousin-german; making in all four degrees.

A grandson of the brother and a son of the uncle, *i. e.*, a great-nephew and a cousin german, are in equal degree, being each four degrees removed.

A grandson of a cousin german is in the same degree as the grandson of a great uncle, for they are both in the sixth degree of kindred. [See Sec 86 (s) post].

TABLE OF CONSANGUINITY.



PART IV.

DOES NOT APPLY TO HINDUS NOR TO PARSEES EXCEPT

SEC. 25.

Of Intestacy.

As to what property a deceased person is considered to have died intestate.

25. A man is considered to die intestate in respect of a property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations.

(a) A has left no Will. He has died intestate in respect of the whole of his property.

(b) A has left a Will, whereby he has appointed B his executor; but the Will contains no other provisions. A has died intestate in respect of the distribution of his property.

(c) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(d) A has bequeathed 1,000/ to B and 1,000/ to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000/ and no other property. C died before A, without having ever had a son. A has died intestate in respect of the distribution of 4,000/.

Devolution of Such property.

26. Such property devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules herein prescribed.

Explanation.—The widow is not entitled to the provision hereby made for her, if by a valid contract made before her marriage. She has been excluded from her distributive share of her husband's estate. This section does not destroy the rule of survivorship *Francis Ghosal v. Gobri Ghosal* 8 Bom. L. R. 770, I. L. R. 31 B. 25, see however, *Tellis v. Saldanka* I. L. R. 10 M. 69. This sec applies to Parsees. See Parsee succession Act (Act XXI of 1865).

27. Where the intestate has left a widow, if he has also left any lineal descendants, one third of his property shall belong

Where the intestate has left a widow and lineal descendants, or a widow and kindred only, or a widow and no kindred.

to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules herein contained. If he has left no lineal descendants, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him,

in the order and according to the rules herein contained. If he has left none who are of kindred to him, the whole of his property shall belong to his widow. See 12 C. L. J. 459 (Nepen Bala's case).

28. Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules herein contained; if he has left none who are of kindred to him, it shall go to the Crown.

Where the intestate has left no widow and where he has left no kindred.

PART V.

Of the Distribution of an Intestate's Property

(a) Where he has left lineal Descendants.

29. The rules for the distribution of the intestate's property (after deducting the widow's share if he has left a widow) amongst his lineal descendants, are as follows:—

30. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there be only one, or shall be equally divided among all his surviving children.

Where the intestate has left a child or children only.

31. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren, and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild, if there be only one, or shall be equally divided among all his surviving grandchildren.

Where the intestate has left no child but a grandchild or grandchildren.

Illustrations.

(a) A has three children, and no more; John, Mary, and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren shall have one-ninth.

(b) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

(c) A has two children, and no more; John and Mary. John dies before his father, leaving his wife pregnant. Then A dies, leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and such posthumous child.

Where the intestate has only grand-children.

32. In like manner, the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great grand-children to him, or are all in a more remote degree.

33. If the intestate has left lineal descendants who do not stand in the same degree of kindred to him, and the persons

Where the intestate leaves lineal descendants not all in the same degree of kindred to him and those through whom the more remote descendants are dead.

through whom the more remote are descended from him, are dead, the property shall be divided into such a number of equal shares, as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him; and one of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively, if such parent or parents had survived the intestate.

Illustrations.

(a) A had three children, John, Mary, and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of A intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(b) A left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild; and the remaining one-ninth is equally divided between the two great-grandchildren.

(c) A has three children, John, Mary and Henry. John dies leaving four children, and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry; one-third to Mary's child; and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

(b) *Where the Intestate has left no lineal descendants.*

Rules of distribution where the intestate has left no lineal descendants.

Where intestate's father is living.

34. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) are as follows:—

35. If the intestate's father is living he shall succeed to the property.

Where intestate's father is dead, but his mother, brothers, and sisters are living.

36. If the intestate's father is dead, but the intestate's mother is living, and there are also brothers and sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Illustrations.

A dies intestate, survived by his mother and two brothers of the full blood, Henry, and a sister Mary, who is the daughter of his mother, but not of his father. The mother takes one-fourth, each brother takes one-fourth, and Mary, the sister, takes one-fourth.

37. If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister, and the child, or children

Where intestate's father is dead, and his mother, a brother or sister, and children of any deceased brother or sister are living.

of any brother or sister who may have died in the intestate's life-time, are also living, then the mother and each living brother or sister and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the

shares which their respective parents would have taken if living at the intestate's death.

Illustrations.

A, the intestate, leaves his mother, his brothers, John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood, who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each take one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

38. If the intestate's father is dead, but the intestate's mother is living and the brothers and sisters are all dead, but all or any

Where intestate's father is dead and his mother and the children of any deceased brother or sister are living.

of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the share which their respective

parents would have taken if living at the intestate's death.

Illustrations.

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister, Mary, and two children of a deceased brother George. The mother takes one-third the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

Where intestate's father is dead, but his mother is living, and there is no brother nor sister, nor nephew.

39. If the intestate's father is dead, but the intestate's mother is living, and there is neither brother nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

40. Where the intestate has left neither lineal descendants nor father nor

Where intestate has left neither lineal descendants, nor father nor mother.

mother, the property is divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one), taking in equal shares only the share which their respective parents would have taken if living at the intestate's death.

Where intestate has left neither lineal descendants nor parent, nor brother nor sister.

41. If the intestate left neither lineal descendant, nor parent, nor brother, nor sister, his property will be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Illustrations.

(a) A, the intestate, has left a grandfather and a grandmother, and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

(b) A, the intestate, has left a great-grandfather or great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree shall take equal shares.

(c) A, the intestate, left a great-grandfather, an uncle, and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree shall take equal shares.

(d) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They shall each take one-eleventh of the property.

42. Where a distributive share in the property of a person who had died intestate, shall be claimed by a child, or any descendant of a child of such person, no money or other property which the intestate may during his life have paid, given, or settled, to or for the advancement of the child by whom or by whose descendant the claim is made, shall be taken into account, in estimating such distributive share.

Children's advancement not to be brought into hotch-pot.

PART VI.

Of the Effect of Marriage and Marriage Settlements on Property.

43. The husband surviving his wife has the same rights in respect of her property, if she die intestate, as the widow has in respect of her husband's property, if he die intestate.

Rights of widower and widow respectively.

44. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby, if both were domiciled in British India at the time of the marriage.

No rights to property not comprised in an antenuptial settlement acquired by marriage between a person domiciled and a person not domiciled in British India.

Settlement of minor's property in contemplation of marriage.

45. The property of a minor may be settled in contemplation of marriage provided the settlement be made by the minor with the approbation of the minor's father, or if he be dead or absent from British India, with the approbation of the High Court.

PART VII.

46. *See ante p. 79.*

47. A father, whatever his age may be, may, by will, appoint a guardian or guardians for his child during minority.

Testamentary guardian.

This Section does not apply to Hindu wills. This being so a Hindu father has no statutory power to appoint a guardian by will *i.e.* testamentary guardian.

If he has any such power, it must be under Hindu Law as distinct from a statute (*Budhilal v. Morarji*, I. L. R. 31 B. 413; 9 Bom. L. R. 553).

48. See *ante*, p. 102.

49. „ „ p. 120.

PART VIII.

50. „ „ p. 122.

51. „ „ p. 143.

PART IX.

Of Privileged Wills.

52. Any Soldier being employed in an expedition, or engaged in actual warfare, or any mariner being at Sea, may, if he has completed the age of eighteen years, dispose of his property by a will made as is-mentioned in the fifty-third section. Such Wills are called Privileged Wills.

Illustrations.

(a) A, the Surgeon of a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged Will.

(b) A, is at sea in a merchant ship, of which he is the purser. He is a mariner, and being at sea, can make a privileged Will.

(c) A, a Soldier serving in the field against in-surgents, is a soldier engaged in actual warfare, and as such can make a privileged Will.

(d) A, a mariner of a ship in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged Will.

(e) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged Will.

(f) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged Will.

Mode of making, and rules for executing privileged Wills.

53. Privileged Wills may be in writing, or may be made by word of mouth. The execution of them shall be governed by the following rules:—

First.—The Will may be written wholly by the testator with his own hand. In such case it need not be signed nor attested.

Second.—It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

Third.—If the instrument purporting to be a Will is written wholly or in part by another person, and is not signed by the testator, it shall be considered to be his will, if it be shown that it was written by the testator's directions, or that he recognized it as his will. If it appear on the face of the instrument,

that the execution of it in the manner intended by him was not completed, the instrument shall not by reason of that circumstance be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

Fourth.—If the soldier or mariner shall have written instructions for the preparation of his Will, but shall have died before it could be prepared and executed, such instructions shall be considered to constitute his Will.

Fifth.—If the soldier or mariner shall in the presence of two witnesses have given verbal instructions for the preparation of his Will, and they shall have been reduced into writing in his life-time, but he shall have died before the instrument could be prepared and executed, such instructions shall be considered to constitute his Will, although they may not have been reduced into writing in his presence, nor read over to him.

Sixth.—Such soldier or mariner as aforesaid may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

Seventh.—A will made by word of mouth shall be null at the expiration of one month after the testator shall have ceased to be entitled to make a privileged Will.

PART X.

Of the Attestation, Revocation, Alteration and Revival of Wills.

54. A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment, to any person attesting it, or to his or her wife or husband: but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person, claiming under either of them.

Explanation.—A legatee under a Will does not lose his legacy by attesting a codicil which confirms the Will.

55. See ante, p. 149.

56. Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised, would not, in default of such appointment pass to his or her executor, or administrator, or to the person entitled in case of intestacy.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

57. See ante, p. 149.

58. „ „ p. 171.

59. „ „ p. 177.

60. „ „ p. 178.

PART XI.

61. *See ante*, p. 200.
 62. " " p. 209.
 63. " " p. 215.
 64. " " p. 224.
 65. " " p. 227.
 66. " " p. 229.
 67. " " p. 231.
 68. " " p. 235.
 69. " " p. 237.
 70. " " p. 240.
 71. " " p. 243.
 72. " " p. 245.
 73. " " p. 246.
 74. " " p. 247.
 75. " " p. 248.
 76. " " p. 251.
 77. " " p. 259.

78. Unless a contrary intention shall appear by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property

Power of appointment by general bequest.

described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object, he may think proper, and shall operate as an execution of such power.

The general principles of the law which are reproduced in concrete form in secs. 24 and 27 of the English Wills Act. (1. Vic. C. 26) have again been reproduced in this section. The proposition of law laid down as the result of the joint operation of these two sections of *English Act*. and of the authorities, is as stated by Farwell J. that "a general power of appointment may be well exercised by a will executed previously to the creation of the power and that too by a mere residuary gift" (1).

In other words a power may be exercised by a will bearing date before the instrument which creates the power, if that instrument comes into operation in the testator's life time. [*Sorabji v Sorabji*, I. L. R., 31 B. 472, 9 Bom. L. R. 488, *Stellman v. Weldon*, 16 Sim, 26; *Boyes v. Cook* 14 Ch. D. 53; *Aircy v. Bower*, 12 App. Ca. 263; *Patch v. Shore*, 7 L. T. 554].

79. Where property is bequeathed to or for the benefit of such of certain objects as a specified person shall appoint, or for the benefit of certain objects in such proportions as a specified person shall appoint; and the will does not provide for the event of no appointment being made; if the power given by the will be

Implied gift to the objects of a power in default of appointment.

(1) Farwell 222; See Ha and Jarm 64-67.

not exercised, the property belongs to all the objects of the power in equal shares.

Illustrations.

A, by his will, bequeaths a fund to his wife for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund shall be divided equally among the children.

80. Where a bequest is made to the "heirs," or "right heirs," or "relations," or "nearest relations," or family," or "kindred, &c., of a particular person without qualifying terms," or "nearest of kin," or "next of kin," of a particular person, without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustrations.

(a) A leaves his property "to his own nearest relations." The property goes to those who would be entitled to it if A had died intestate leaving assets for the payment of his debts independently of such property.

(b) A bequeaths 10,000 rupees "to B for his life, and after the death of B. to his own right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.

(c) A leaves his property to B; but if B dies before him, to B's next of kin; B dies before A; the property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(d) A leaves 10,000 rupees "to B for his life and after his decease, to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate leaving assets for the payment of his debts independently of the legacy.

81. Where a bequest is made to the "representatives," or "legal representatives," or "personal representatives," or "executors or administrators" of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it.

Illustrations.

A bequest is made to the "legal representatives" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and shall apply it in the first place to the discharge of such part of A's debt as may remain unpaid if there be any surplus, B. shall pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.

82. See *ante*, p. 265.

83. " " p. 289.

84. Where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

Effect of words describing a class added to a bequest to a person.

Illustrations.

(a) A bequest is made —

to A and his children,
to A and his children by his present wife,
to A and his heirs,
to A and the heirs of his body,
to A and the heirs male of his body,
to A and the heirs female of his body,
to A and his issue,
to A and his family,
to A and his descendants,
to A and his representatives,
to A and his personal representatives,
to A his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(b) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(c) A bequest is made to A, for life and after his death to his issue. At the death of A, the property belongs in equal shares to all persons who shall then answer the description of issue of A.

85. See *ante*, p. 292.

86. The word "Children" in a will applies only to lineal descendants in the first degree; the word "grandchildren" applies only

Construction of terms. to lineal descendants in the second degree of the person whose "children" or "grandchildren" are spoken of; the words "nephews" and "nieces" apply only to children of; brothers or sisters; the words "cousins" or "first cousins" or "cousins german," apply only to children or brothers or of sisters of the father or mother of the person whose "cousin" or "first cousin" or "cousin german" are spoken of; the words "first cousins once removed" apply only to children of cousins german, or to cousins german of a parent, of the person whose "first cousins once removed" are spoken of; the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of; the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of. Words expressive of collateral relationship apply alike to relatives of full and of half-blood. All words expressive of relationship apply to a child in the womb who is afterwards born alive.

87. In the absence of any intimation to the contrary in the will, the term "child," "son," or "daughter," or any word

Words expressing relationship denote only legitimate, relatives, or falling such relatives reputed legitimate.

which expresses relationship is to be understood as denoting only a legitimate relative, or where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.

Illustrations.

(a) A, having three children, B, C, and D of whom B and C are legitimate and D is illegitimate, leaves his property to be equally divided among his "children." The property, belongs to B and C in equal shares to the exclusion of D.

(b) A, having a niece of illegitimate birth, who has acquired the reputation of being his niece and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(c) A, having in his will, enumerated his children and named as one of them B, who is illegitimate, leaves a legacy to "his said children." B will take a share in the legacy along with the legitimate children.

(d) A leaves a legacy to "the children of B." B. is dead, and has left none but illegitimate children. All those who had at the date of the Will acquired, the reputation of being the children of B are objects of the gift.

(e) A bequeathed a legacy to "the children of B." B never had any legitimate child. C and D had, at the date of the will, acquired the reputation of being children of B. After the date of the will, and before the death of the testator, E and F were born, and acquired the reputation of being children of B. Only C and D are objects of the bequest.

(f) A makes a bequest in favour of his child by a certain woman not his wife. B had acquired at the date of the will the reputation of being the child of A by the woman designated B takes the legacy.

(g) A makes a bequest in favour of his child to be born of a woman, who never becomes his wife. The bequest is void.

(h) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

This Section enacts that in the construction of a will words expressing relationship ordinarily denote only legitimate relationship though, where there is no legitimate, relative they will include an illegitimate relative who has acquired the reputation of being the relative in question. This is a well-known doctrine of English law as illustrated in *Seal-Hayne v. Jodrell* 1891 A.C. 304 (Smith v. Massey ; I. L. R. 30 B. 504, 8 Bom. L. R. 322).

88. See *ante*, p. 296.

89. p. 302.

90. p. 305.

91. p. 311.

92. p. 313.

93. p. 320.

94. p. 326.

95. p. 330.

96. p. 331.

97. p. 333.

p. 335.

PART XII.

99. See *ante*, p. 345.

100. „ „ p. 352.

101. „ „ p. 353.

102. p. 369.

103. p. 377.

104. A direction to accumulate the income arising from any property shall be void ; and the property shall be disposed of as if no accumulation had been directed.

Effect of direction for accumulation.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid.

in respect only of the income arising from the property within one year next following the testator's death; and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

Illustrations.

(a) The will directs that the sum of 10,000 rupees, shall be invested in Government securities, and the income accumulated for 20 years, and the principal together with the accumulations, shall then be divided between A, B and C. A., B and C are entitled to receive the sum of 10,000 rupees at the end of the year from the testator's death.

(b) The will directs that 10,000 rupees shall be invested, and the income accumulated, until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year from the testator's death.

(c) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B shall receive at the end of one year from the testator's death the rents which have accrued during the year, together with any interest which may have been made by investing them.

(d) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulations shall then be paid to the eldest son of A. At the death of the testator, A has no son. The bequest is void.

(e) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the will, but in consequence of B's minority.

105. No man having a nephew or niece or any nearer relative, shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

Illustrations.

A having a nephew makes a bequest by a will not executed, nor deposited as required—

- For the relief of poor people;
- For the maintenance of sick soldiers;
- For the erection or support of a hospital;
- For the education and preferment of orphans;
- For the support of scholars;
- For the erections or support of a school;
- For the building and repairs of a bridge;
- For the making of roads;
- For the erection or support of a church;
- For the repairs of a church;
- For the benefit of ministers of religion;
- For the formation or support of a public garden.

All these bequests are void.

Sec. 105.—The relatives contemplated by this section, are those born of lawful wed-lock [*Smith v. Massey*, I. L. R. 30 B. 500; 8 Bom. L. R. 322]. See *Agnew's Trusts* p. 371 or "the Oudh Estates Act (1 of 1869) Sec. 17, 18, 20.

Not less than 12 months.—Where a codicil republishing a will, was not executed before 12 months nor deposited within six months as provided

in this section, it was argued that in as much as the will must be taken to have been made on the date of the codicil [vide *ante* Sec. 60 (s). § 9], and such will purported to make gifts for charitable purposes within the meaning of this section; the will and the codicil, were both in operative and it was held by Mr. Justice Choudhury [following *Hopwood v. Hopwood* (1859) 7 H. L. Cas 728, 740 and *In re Moore Long v. Moore* (1907) 1 Ir. Rep. 315] that a codicil did not always operate as if the will was made at the date of such codicil and that in consequence thereof as laid down *In re Moore; Long v. Moore* [(1907) 1 Ir. Rep. 315], the charitable gifts were not invalidated merely by the fact that the will containing it was confirmed and republished by a codicil made less than 12 months before the testator's death. *Administrator General of Bengal v. Hughes* (1912) 40 C. 192; 203, 204]. See *Jarm* 205, 206, 6th Edn.

In other words "Will" in this section does not include a codicil which republishes it and which was not before made nor deposited within time prescribed by this section. This sec. corresponds with sec. 16, 7 and 8 Vict. C. 97 (*Ibid*). A testatrix devised and bequeathed her real and personal estate upon trust to sell and convert into money, such portions as should be necessary upon trust for the maintenance of a temporary house of residence for ladies of limited means with directions that "if at any time such house should be considered unnecessary the money thus set apart was to be distributed by the trustees in yearly payment to such ladies as they might consider worthy of such assistance. Held that the trust was a good charitable trust of so much of the estate as might be necessary for the maintenance of the house and the subsequent alternative bequests did not render it void for uncertainty. [In re *Gardon Le Page v. Att. Genl.* (1914) 1 Ch. 662].

PART XIII.

106. See *ante*, p. 380.
 107. " " p. 396.
 108. " " p. 405.

PART XIV.

109. " " p. 407.
 110. " " p. 408.

PART XV.

111. " " p. 409.
 112. " " p. 416.

PART XVI.

113. See *ante*, p. 426.
 114. " " p. 428.

115. *See ante*, p. 430.
 116. " " p. 434.
 117. " " p. 437.
 118. " " p. 438.
 119. " " p. 442.
 120. " " p. 447.
 121. " " p. 449.
 122. " " p. 450.
 123. " " p. 451.
 124. " " p. 452.

PART XVII.

125. " " p. 454.
 126. " " p. 462.
 127. " " p. 466.

PART XVIII

128. " " p. 475.

PART XIX.

129. " " p. 479.
 130. " " p. 484.
 131. " " p. 485.
 132. " " p. 486.
 133. " " p. 487.
 134. " " p. 489.
 135. " " p. 489.
 136. " " p. 491.

PART XX.

137. " " p. 493.
 138. " " p. 496.

PART XXI.

139. " " p. 497.
 140. " " p. 500.
 141. " " p. 501.
 142. " " p. 502.

- 143.** *See ante*, p. 503.
144. „ „ p. 503.
145. „ „ p. 504.
146. „ „ p. 505.
147. „ „ p. 506.
148. „ „ p. 506.
149. „ „ p. 508.
150. „ „ p. 508
151. „ „ p. 510.
152. „ „ p. 511.
153. „ „ p. 511.

PART XXII.

- 154.** „ „ p. 512.
155. „ „ p. 516.
156. „ „ p. 517.
157. „ „ p. 517.

PART XXIII.

- 158.** „ „ p. 520.

PART XXIV.

- 159.** „ „ p. 521.

PART XXV.

- 160.** „ „ p. 526.
161. „ „ p. 531.
162. „ „ p. 532.
163. „ „ p. 534.

PART XXVI.

- 164.** „ „ p. 535.
165. „ „ p. 537.
166. „ „ p. 538.

PART XXVII.

- 167.** „ „ p. 541.
168. „ „ p. 548.

169. *See ante*, p. 549.
 170. " " p. 550.
 171. " " p. 550.
 172. " " p. 551.
 173. " " p. 552.
 174. " " p. 555.
 175. " " p. 555.
 176. " " p. 556.
 177. " " p. 557.

PART XXVIII.

Of Gifts in Contemplation of Death.

178. A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will. A gift is said to be made in contemplation of death where a man who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case, the donor shall die of that illness. Such a gift may be resumed by the giver. It does not take effect, if he recovers from the illness during which it was made, nor if he survives the person to whom it was made.

Property transferable by gift made in contemplation of death.
When gift is said to be made in contemplation of death.
Such gift resumable.
When it fails.

Illustrations.

(a) A being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death—

A watch.
 A bond granted by C to A.
 A Bank Note.
 A promissory note of the Government of India endorsed in blank.
 A Bill of Exchange endorsed in blank.
 Certain mortgage deeds.

A dies of the illness during which he delivered these articles.

B is entitled to—

The watch.
 The debt secured by C's bond.
 The Bank Note.
 The promissory note of the Government of India.
 The Bill of Exchange.
 The money secured by the mortgage deed.

(b) A being ill, and in expectation of death, delivers to B the key of a trunk, or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents, or to A's goods of bulk in the warehouse.

(c) A being ill and in expectation of death, puts aside certain articles in separate parcels, and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

PART XXIX.

*(Chap II Act V, 1881 ante)*179. *See ante, Sec. 4 (P) p. 575.*

180. " " " 5 (P) p. 584.

181. " " " 6 (P) p. 588.

182. " " " 7 (P) p. 593.

183. " " " 8 (P) p. 605.

184. " " " 9 (P) p. 607.

185. " " " 10 (P) p. 609.

186. " " " 11 (P) p. 610.

187. " " " p. 558.

188. " " " 12 (P) p. 612.

189. " " " 13 (P) p. 621.

No right to intestate's property can be established unless administration previously granted by a competent court.

* 190. No right to any part of the property of a person who has died intestate, can be established in any Court of Justice unless letters of administration have first been granted by a Court of competent Jurisdiction.

See Hind's Testa—2nd Edn:—p. 168 and 169.

or I. L. R 4A. 192 ;

— 18B. 337.

— 19B. 828.

— 7C. 574.

— 5C. 2.

As regards the Administrators Genl of any of the Presidencies in Bengal, Madras and Bombay, the H. Court etc. See Adn. Genl. Act sec. 14 (II. of 1874).

Note.—This section does not apply to any part of the property of a Native Christian who has died, intestate. See Sec. 3 Act VII of 1901.

191. *See ante, Sec. 14 (P), p. 622.*

192. " " " 15 (P), p. 622.

193. " " " 16 (P), p. 625.

194. " " " 17 (P), p. 627.

195. " " " 18 (P), p. 630.

196. " " " 19 (P), p. 632.

197. " " " 20 (P), p. 635.

198. " " " 21 (P), p. 636.

199. " " " 22 (P), p. 639.

200. When the deceased has died intestate, those who are connected with him either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated.

Order in which connections by marriage or consanguinity are entitled to administration.

201. If the deceased has left a widow, administration shall be granted to the widow, unless the Court shall see cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Administration to be granted to widow unless Court see cause to exclude her.

Illustrations.

(a) The widow is a lunatic, or has committed adultery or has been barred by her marriage settlement of all interest in her husband's estate, there is cause for excluding her from the administration.

(b) The widow has married again since the decease of her husband; this is not good cause for her exclusion.

202. If the Judge think proper he may associate any person or persons with the widow in the administration, who would be entitled solely to the administration if there were no widow.

Persons associated with the widow in administration.

203. If there be no widow, or if the Court see cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate; provided that when the mother of the deceased shall be one of the class of persons so entitled, she shall be solely entitled to administration.

Grant of administration where no widow, or widow excluded.

Proviso.

204. Those who stand in equal degree of kindred to the deceased, are equally entitled to administration.

Deceased's kindred of equal degree, equally entitled to administration.

205. The husband, surviving his wife, has the same right of administration of her estate as the widow has in respect of the estate of her husband.

Right of widower to administration of wife's estate.

206. When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration, and willing to act, they may be granted to a creditor.

Grant of administration to a creditor.

207. Where the deceased has left property in British India, letters of administration must be granted according to the foregoing rules, although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India.

Where deceased has left property in British India, administration must be granted according to the foregoing rules.

This section read with section 145 A (P) corresponding with section 326 A (S) seems to warrant the conclusion that it contemplates cases of persons, who being domiciled elsewhere, die in British India leaving property there but not in the country of their domicile or in any other foreign country. In other words, this section contemplates of single administration and not of different administrations granted in different countries, as section $\frac{145 \text{ A (P)}}{326 \text{ A (S)}}$ does.

PART XXX.

(Chaps. III & IV, Act V, 1881, ante),

208. See ante, Sec. 24 (P), p. 645.**209.** " " " 25 (P), p. 646.**210.** " " " 26 (P), p. 650.**211.** " " " 27 (P), p. 651.

212. " " " 28 (P), p. 651.—*Attorney*:—Formerly one appointed to act for another in important matters, especially those pertaining to law. Strictly speaking, an attorney was one who managed any legal matters for another in a Common Law Court. In this respect an attorney differed from a solicitor who practised in a Court of Equity. The attorneys were formed into a regular body, to which no new-members were admitted except those who had conformed to the Regulations laid down in stat 6 and 7 vict C. 73. By the Judicature Act of 1873 (36 and 37 vict C. 36. Sec. 87), however what were previously called attorneys are now denominated solicitors of the Supreme Court so that for practical practices, the terms are now synonymous. (1).

An agent is one who acts for another *i.e.* a factor, a substitute or a deputy. Agents are of several classes, such as Law Agents Commercial-Agents. Political Agents &c.

213. See ante, Sec. 29 (P), p. 655.**214.** " " " 30 (P), p. 655.**215.** " " " 31 (P), p. 656.**216.** " " " 32 (P), p. 659.**217.** " " " 33 (P), p. 659.**218.** " " " 34 (P), p. 662.**219.** " " " 35 (P), p. 666.**220.** " " " 36 (P), p. 667.**221.** " " " 37 (P), p. 667.**222.** " " " 38 (P), p. 671.**223.** " " " 39 (P), p. 672.**224.** " " " 40 (P), p. 674.**225.** " " " 41 (P), p. 675.**226.** " " " 42 (P), p. 679.**227.** " " " 43 (P), p. 682.**228.** " " " 44 (P), p. 684.**229.** " " " 45 (P), p. 685.**230.** " " " 46 (P), p. 692.**231.** " " " 47 (P), p. 694.**232.** " " " 48 (P), p. 696.

(1) See Encyclopaedic Dictionary and Encyclo Brit act "Attorney."

233. See *ante*, Sec. 49 (P), p. 698.

234. " " " 50 (P), p. 699.

PART XXXI.

(*Chap. V. Act V, 1881, ante*).

235. See *ante*, Sec. 51 (P), p. 718.

235 A. " " " 52 (P), p. 720.

236. " " " 53 (P), p. 721.

237. " " " 54 (P), p. 722.

238. " " " 55 (P), p. 724.

239. Until probate be granted of the will of a deceased person, or an administrator of his estate be constituted, the District Judge within whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property, at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he shall see fit, to appoint an officer to take and keep possession of the property.

Note—This section does not apply to any part of the property of a Native Christian who has died intestate. See Act VII of 1901, sec. 3

Under this section a receiver may be appointed by the Court (*Yeshwant v. Shankor* I. L. R. 17 B. 388).

Mahammedan Law.—The rule of the Court of Chancery that a receiver will not be appointed against an executor unless gross misconduct, is shown, is not applicable to the case of an executor of the will of a Mahommedan [*Haftzabai v. Kazi Abdul Karim* (1893) I. L. R. 19 B. 83].

This section seems to have been Suggested by section* 5 of Act XIX of 1841. "An Act for the protection of moveable and immoveable property against wrongful possession in cases of successions," called also the Curator's Act. That Act "was passed in order to meet cases of wrongful possession or disturbance of possession under pretended claims of right and discountenance the employment of force and fraud" [*Joshoda Koonwar v. Gouree Byjnath Pershad* (1866) 2 Rev. Civt Cr. Rep. per Jackson J].

240. See *ante*, Sec. 56 (P), p. 728.

241. " " " 57 (P), p. 730.

241 A. " " " 58 (P), p. 731.

242. " " " 59 (P), p. 732.

242 A. " " " 60 (P), p. 736.

243. " " " 61 (P), p. 737.

* Sec. 5 Act XIX, 1841, runs as follows,

244.	<i>See ante, Sec.</i>	62 (P), p. 738
245.	" "	63 (P), p. 742.
246.	" "	64 (P), p. 743.
246 A.	" "	65 (P), p. 745
247.	" "	66 (P), p. 745.
248.	" "	67 (P), p. 746.
249.	" "	68 (P), p. 747.
250.	" "	69 (P), p. 748
251.	" "	70 (P), p. 768.
252.	" "	71 (P), p. 770
253.	" "	72 (P), p. 771.
253 A.	" "	73 (P), p. 772.
253 B.	" "	74 (P), p. 773
253 C.	" "	75 (P), p. 774.
254.	" "	76 (P), p. 774
255.	" "	77 (P), p. 779
256.	" "	78 (P), p. 781
257.	" "	79 (P), p. 786.
258.	" "	80 (P), p. 788.
259.	" "	81 (P), p. 789.
260.	" "	82 (P), p. 790.
261.	" "	83 (P), p. 790.
262.	" "	84 (P), p. 796.
263.	" "	86 (P), p. 799.
264.	" "	87 (P), p. 801.

PART XXXII.

Of Executors of their own Wrong.

265. A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

Exceptions. First.—Intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

Second.—Dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his own wrong.

Illustrations.

(a) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy, or receives payment of the debts of the deceased. He is an executor of his own wrong.

(b) A, having been appointed agent, by the deceased in his life-time to collect his debts and sell his goods continues to do so after he has become aware of his death. He is an executor of his own wrong, in respect of acts done after he has become aware of the death of the deceased.

(c) A, sues as executor of the deceased, not being such. He is an executor of his own wrong.

266. When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or

Liability of an executor of his own wrong.

administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands, after deducting payments made to the rightful executor or administrator and payments made in a due course of administration.

PART XXXIII.

(*Chap. VI, Act V, 1881, Ante.*)

267. *See ante, Sec. 88 (P), p. 803.*

268. " " " 89 (P), p. 804.

269. An executor or administrator has power to dispose of the property of the deceased either, wholly or in part, in such manner as he may think fit.

Illustrations.

(a) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(b) The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

Note.—This section so materially differs from section 90 of Act V of 1881, which corresponds with it, that it may be taken as not incorporated in that Act.

270. *See ante, Sec. 91 (P), p. 825.*

271. " " " 92 (P), p. 826.

272. " " " 93 (P), p. 830.

273. " " " 94 (P), p. 832.

274. " " " 95 (P), p. 832.

275. " " " 96 (P), p. 832.

PART XXXIV.

(*Chap. VII, Act V, 1881, ante.*)

276 *See ante, Sec. 97 (P), p. 834.*

NOTES AND COMMENTARIES.

If the deceased has left direction as to the disposal of his body it is the duty of his personal representative to carry out such directions. In the absence of

any such direction the deceased is entitled to Christian Burial (*Gilbert v. Buzzard*, 2. Hogg 333, 343; *Reg. v. Stewart*, 12 A. & E. 773) (1).

277. See ante, Sec. 98 (P), p. 837.

277 A. " " " 99 (P), p. 845.

278. " " " 100 (P), p. 845.

279. " " " 101 (P), p. 848.

280. " " " 102 (P), p. 849.

281. " " " 103 (P), p. 852.

282. " " " 104 (P), p. 854.

Application of moveable property to payment of debts, where the deceased's domicile was not in British India.

283. If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of [the country in which he was domiciled], British India.

Illustration.

[A dies, having his domicile in a country where instruments under seal have priority over documents not under seal, leaving moveable property to the value of 10,000 rupees, immoveable property to the value of 5,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The debts on the instruments under seal are to be paid in full out of the moveable estate, and the proceeds of the immoveable estate are to be applied as far as they will extend towards the discharge of the debts not under seal. Accordingly, one-half of the amount of the debts not under seal is to be paid out of the proceeds of the immoveable estate.]

Note.—The words in brackets including the illustration have been repealed, the words "British India" being substituted for the words repealed in the section by sec. 9 of Act VI of 1881.

Creditor paid in part under sec. 283 to bring such payment into account before sharing in the proceeds of immoveable property.

284. No creditor who has received payment of a part of his debt by virtue of the last preceding section, shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of 5,000 rupees, and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees, which are to be distributed rateably amongst all the creditors without distinction in proportion to the amount which may remain due to them.

285. See ante, Sec. 105 (P), p. 860.

286. " " " 106 (P), p. 861.

287. " " " 107 (P), p. 862.

288. " " " 108 (P), p. 864.

(1) See Wms. 737 10th Edn. and See 97 (P).

289. *See ante, Sec. 109 (P), p. 865.*
 290. " " " 110 (P), p. 866.
 291. " " " 111 (P), p. 866.

PART XXXV.

(*Chap. VIII, Act V, 1881, ante*).

292. *See ante, Sec. 112 (P), p. 867.*
 293. " " " 113 (P), p. 871.
 294. " " " 114 (P), p. 872.
 295. " " " 115 (P), p. 872.
 296. " " " 116 (P), p. 874.
 297. " " " 117 (P), p. 875.

PART XXXVI.

(*Chap. IX, Act V, 1881, ante*).

298. *See ante, Sec. 118 (P), p. 877.*
 299. " " " 119 (P), p. 877.
 300. " " " 120 (P), p. 878.

PART XXXVII.

(*Chap. X, Act V, 1881, ante*).

301. *See ante, Sec. 121 (P), p. 879.*
 302. " " " 122 (P), p. 880.
 303. " " " 123 (P), p. 881.
 304. " " " 124 (P), p. 882.

305. Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in such securities as the High Court may for the time being regard as good securities, shall be converted into money and invested in such securities.

Investment of residue bequeathed to a person for life, without direction to invest in particular securities.

306. *See ante, Sec. 125 (P), p. 884.*
 307. " " " 126 (P), p. 884.
 308. " " " 127 (P), p. 885.

PART XXXVIII.

(Chap. XI, Act V, 1881, ante).

309. See ante, Sec. 128 (P), p. 888.
 310. " " " 129 (P), p. 889.
 311. " " " 130 (P), p. 889.
 312. " " " 131 (P), p. 891.
 313. " " " 132 (P), p. 892.
 314. " " " 133 (P), p. 893.
 315. " " " 134 (P), p. 893.

PART XXXIX.

(Chap. XII, Act V, 1881, ante).

316. See ante, Sec. 135 (P), p. 894.
 317. " " " 136 (P), p. 894.
 318. " " " 137 (P), p. 895.
 319. " " " 138 (P), p. 895.
 320. " " " 139 (P), p. 896.
 321. " " " 140 (P), p. 898.
 322. " " " 141 (P), p. 899.
 323. " " " 142 (P), p. 899.
 324. " " " 143 (P), p. 900.
 325. " " " 144 (P), p. 901.
 326. " " " 145 (P), p. 901.
 326 A. " " " 145 A (P), p. 902.

PART XL.

(Chap. XIII, Act V, 1881, ante).

327. See ante, Sec. 146 (P), p. 903.
 328. " " " 147 (P), p. 905.

PART XLI.

Miscellaneous.

329. For every instrument or writing of any of the kinds specified in the Schedule to this Act, and which shall be made or executed after the commencement of this Act, there shall be payable to Government a stamp duty or fee of the amount indicated in the said Schedule.

Repealed.
 Stamps or fees on instruments mentioned in this Act.

Note.—This section was repealed by Act VII. of 1870.

330. Nothing contained in this Act shall be deemed or taken to supersede or affect the rights, duties, and privileges of the Administrators-General and Officiating Administrators-General of Bengal, Madras and Bombay respectively, under or by virtue of Act VIII of 1855 (to amend the

Repealed.
 Saving of rights, duties, and privileges of Administrator-General.

(*also relating to the office and duties of Administrator-General*), Act XXVI of 1860 (*to amend Act VIII of 1855*), the Regimental Debts Act, 1863, and the Administrator-General's Act, 1865; and it shall be the duty of the Magistrate or other Chief officer charged with the executive administration of a district or place in criminal matters, whenever any person to whom the provisions of this Act shall apply shall die within the limits of his jurisdiction, to report the circumstances without delay to the Administrator-General of the Province, retaining the property under his charge until letters of administration shall have been obtained by that officer or by some other person, when the property is to be delivered over to the person obtaining such letters, or who may obtain probate of the will (if any) of the deceased.

Note.—This section was repealed by Act XXIV of 1867.

381. The provisions of this Act shall not apply to Intestate or Testamentary succession to the property of any Hindu, Muhammadan or Buddhist; nor shall they apply to any will made, or any intestacy occurring before the first day of January, 1866. The fourth section shall not apply to any marriage contracted before the same day.

Succession to property of Hindus, Muhammadans or Buddhists and certain Wills, Intestacies, and marriages not affected by this Act.

This section exempts the property of Hindus from the operation of this Act, but there is no prohibition to a Hindu succeeding under it, to the property of a Christian, [*Administrator Gen. Madras v. Anandchari* (1884) 9 M., 466.]

As to the meaning and application of the words "Hindus" and "Buddhists" see sec. 2. Hindu Wills Act (XXI of 1870).

For the purpose of this section a Hindu etc. must be a Hindu etc. at the time of his death. [*Nepembala Dabi v. Siti Kanta Bannerjee* (1910) 12 C. L. J. 459].

382. The Governor-General of India in Council shall from time to time have power, by an order, either retrospectively from the passing of this Act, or prospectively, to exempt from the operation of the whole or any part of this Act the members of any race, sect, or tribe in British India or any part of such race, sect or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order. The Governor-General of India in Council shall also have power from time to time to revoke such order, but not so that the revocation shall have any retrospective effect. All orders and revocations made under this section shall be published in the Gazette of India.

Power of Governor-General to exempt any race, sect, or tribe in British India from the operation of this Act.

383. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment of either description for a term which may extend to three months, or with both.

Note. This section was added by sec. 17 of Act VI of 1889. See Sec. 157, App. A.

(SCHEDULE.—Repealed by Act VII of 1870.)

